

19
No. 91-542-CFH
Status: GRANTED

Title: Ellis B. Wright, Jr., Warden and Mary Sue Terry,
Attorney General of Virginia, Petitioners
v.
Frank Robert West, Jr.

Docketed:

September 26, 1991 Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Curry, Donald R.

Counsel for respondent: Goldblatt, Steven H.

NOTE: See mail label re dkt dt 093091 ck rec'd

Entry	Date	Note	Proceedings and Orders
1	Sep 26 1991	G	Petition for writ of certiorari filed.
3	Oct 18 1991		Order extending time to file response to petition until November 20, 1991.
4	Oct 24 1991		Brief amicus curiae of Criminal Justice Legal Foundation filed.
6	Nov 19 1991		Brief of respondent Frank West in opposition filed.
7	Nov 19 1991	G	Motion of respondent for leave to proceed in forma pauperis filed.
8	Nov 19 1991	X	Brief amici curiae of Florida, et al. filed.
5	Nov 20 1991		DISTRIBUTED. December 6, 1991
9	Nov 22 1991	X	Reply brief of petitioners Wright, Warden, et al. filed.
11	Dec 9 1991		REDISTRIBUTED. December 13, 1991
12	Dec 16 1991		Motion of respondent for leave to proceed in forma pauperis GRANTED.
13	Dec 16 1991		Petition GRANTED.
14	Dec 18 1991		***** The order of December 16, 1991, granting the petition for a writ of certiorari, is amended as follows: The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted. In addition to the questions presented by the petition, the parties are requested to brief and argue the following questions: In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination de novo? [Justice Blackmun and Justice Stevens dissent].
15	Jan 15 1992		Record filed.
		*	Certified record and proceedings U.S. Court of Appeals- Fourth Circuit and U.S.D.C., Eastern Dist. VA. (1 Box)
16	Jan 30 1992		Brief amici curiae of Florida, et al. filed.
17	Jan 30 1992		Brief amicus curiae of Criminal Justice Legal Foundation filed.
18	Jan 30 1992		Joint appendix filed.
19	Jan 30 1992		Brief of petitioners Wright, Warden, et al. filed.
20	Feb 3 1992		Brief amicus curiae of United States filed.

Entry	Date	Note	Proceedings and Orders
27	Feb 5 1992		SET FOR ARGUMENT TUESDAY, MARCH 24, 1992. (2ND CASE).
21	Feb 13 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
23	Feb 21 1992		CIRCULATED.
22	Feb 24 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
24	Mar 2 1992	X	Brief of respondent Frank West (TO BE PRINTED) filed.
25	Mar 2 1992	G	Motion of the Attorney General of North Dakota to withdraw as amicus curiae filed.
32	Mar 2 1992	X	Brief of respondent Frank West filed.
34	Mar 2 1992		Brief amici curiae of New York and Ohio filed.
33	Mar 3 1992		Brief amici curiae of American Civil Liberties Union, et al. filed.
28	Mar 4 1992	X	Brief amici curiae of Senator Biden and Representative Edwards filed.
29	Mar 4 1992	G	Motion of Benjamin R. Civiletti, et al. for leave to file a brief as amici curiae filed.
30	Mar 4 1992	G	Motion of Gerald Gunther, et al. for leave to file a brief as amici curiae filed.
31	Mar 4 1992		Brief amicus curiae of American Bar Association filed.
26	Mar 9 1992		Motion of the Attorney General of North Dakota to withdraw as amicus curiae GRANTED.
35	Mar 13 1992	X	Reply brief of petitioner Wright, Warden, et al. filed.
36	Mar 23 1992		Motion of Benjamin R. Civiletti, et al. for leave to file a brief as amici curiae GRANTED.
37	Mar 23 1992		Motion of Gerald Gunther, et al. for leave to file a brief as amici curiae GRANTED.
38	Mar 24 1992		ARGUED.

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91-548
No. _____

FILED
SEP 26 1991

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In The
Supreme Court of the United States
October Term, 1991

ELLIS B. WRIGHT, JR., WARDEN, et al.,
Petitioners,
v.

FRANK ROBERT WEST, JR.,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. May a federal court grant collateral relief merely because it disagrees with the good faith reasonable decision of the state courts?
- II. May a federal court fundamentally alter the standard established by this Court in *Jackson v. Virginia* and vacate a state conviction on the basis of nothing more than "concern" about a deeply-rooted common law principle that the prisoner never raised in state court?

LIST OF PARTIES

The petitioners in this Court were the respondents in the proceedings below: Ellis B. Wright, Warden, and Mary Sue Terry, Attorney General of Virginia (hereafter "the Commonwealth"). The respondent, Frank Robert West, Jr., a Virginia prisoner, was the petitioner in the proceedings below.

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PETITION FOR WRIT OF CERTIORARI
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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 931 F.2d 262 (4th Cir. 1991). (App. 1-22). The Fourth Circuit's amended order denying the Commonwealth's petition for rehearing and suggestion for rehearing in banc is reprinted in the appendix. (App. 34-35).

The memorandum opinion of the United States District Court for the Eastern District of Virginia, which denied West's petition for habeas corpus relief, is unreported but is reprinted in the appendix. (App. 23-33).

JURISDICTION

The judgment of the Fourth Circuit was entered on April 29, 1991. The amended order denying the Commonwealth's petition for rehearing was entered on July 8, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS OF LAW

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution states in pertinent part, "[N]or shall any State deprive any person of life, liberty or property, without due process of law. . . ."

STATUTORY PROVISIONS

At the time of West's trial in 1979, Virginia Code § 18.2-95 provided in pertinent part that "[a]ny person who . . . [c]ommits simple larceny not from the person of another of goods and chattels of the value of \$100 or more, shall be deemed guilty of grand larceny which shall be punishable by confinement . . . for not less than one nor more than twenty years or in the discretion of the jury . . . [confinement] in jail for a period not exceeding twelve months or [a fine of] not more than \$1,000, either or both." (Va. Code Ann. § 18.2-95 (Repl. Vol. 1975)).¹

¹ The statutory minimum value has since been raised to \$200. See Va. Code Ann. § 18.2-95 (Repl. Vol. 1988).

The United States Code, 28 U.S.C. § 2254(a), provides that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

On December 13, 1978, Angelo Cardova left his vacation home in Westmoreland County, Virginia, to return to his residence in Northern Virginia. Cardova secured the house when he left and gave no one authority to enter the home, or remove any property from it. Cardova returned to the vacation house on December 26, 1978, and discovered that it had been burglarized and that various items valued at over \$3,000 had been stolen. (App. 2).

On January 10, 1979, sheriff's deputies from Westmoreland and Northumberland Counties searched the Gloucester County home of Frank Robert West, Jr. The deputies found numerous items that had been stolen from the Cardova residence. It is undisputed that West had exclusive possession of the stolen items. (App. 2-3).

West was indicted for grand larceny in Westmoreland County. At trial, Mr. Cardova identified a wide variety of items found in West's possession as having been taken from his vacation home: two television sets, a sleeping bag, a shell-framed mirror, a coffee table, a ball-shaped hardwood carving, a synthetic-fiber fur coat with the name "Esther" embroidered in the lining, a box of flatware, a mounted lobster, a silk jacket with "Korea 1970"

embroidered on the outside, and a record player. The value of the items recovered from West's residence was about \$1,100. (App. 3).

When West, a previously convicted felon, testified at trial, he denied stealing the items found in his home and claimed to have purchased some of them from a Ronnie Elkins. (CA4 App. 168a-179a).² Elkins did not testify, however, and the defense presented no evidence to substantiate West's "explanation."

Even the court below conceded that West's trial testimony "was somewhat confused and [that] he was unable to account for how he acquired some of the merchandise." (App. 4). In fact, the court conceded that "at first blush [West's testimony] may itself seem incredible, thereby drawing all else in question." (App. 19, n.7). The very best that the Fourth Circuit could say about West's "explanation" was that "there was nothing inherently implausible about" it. (App. 18).

The jury was properly instructed, without objection, on the Commonwealth's burden of proof beyond a reasonable doubt, West's presumption of innocence, the jury's role in assessing the credibility of witnesses, and the proper use of circumstantial evidence. The jury was also properly instructed on the elements of the offense. (CA4 App. 209a-221a).

Concerning Virginia's longstanding common law inference involving exclusive possession of recently stolen property, the jury was instructed:

² "CA4 App." refers to the parties' joint appendix in the Fourth Circuit.

If you believe from the evidence beyond a reasonable doubt that property of a value of \$100.00 or more was stolen from Angelo F. Cardova, and that it was recently thereafter found in the exclusive and personal possession of the defendant, and that such possession has been unexplained or falsely denied by the defendant, then such possession is sufficient to raise an inference that the defendant was the thief; and if such inference, taking into consideration the whole evidence, leads you to believe beyond a reasonable doubt that the defendant committed the theft, then you shall find the defendant guilty.

(App. 4). West did not object to this instruction at trial and has never claimed that the instruction was erroneous. The jury found the petitioner guilty of grand larceny and sentenced him to ten years imprisonment.

West's direct appeal raised several issues, including whether the evidence was sufficient to support his conviction. The thrust of his sufficiency claim was that West had provided a reasonable explanation for his possession of the stolen property. (CA4 App. 60a-62a). No claim attacking the validity of Virginia's common law inference was raised. On May 30, 1980, the Supreme Court of Virginia, finding no reversible error, refused the petition. (CA4 App. 40a).

On May 10, 1987, almost eight years after his conviction, West filed a petition for a writ of habeas corpus in the Supreme Court of Virginia. (CA4 App. 71a-78a). That petition repeated the claim that the evidence was insufficient to support his conviction, but again, there was no attack upon the validity of the common law inference.

(CA4 App. 73a). The petition was denied and dismissed on May 13, 1988. (CA4 App. 80a).

On June 12, 1988, West filed his federal habeas petition in the United States District Court for the Eastern District of Virginia, Richmond Division. Included in his petition was his claim that the evidence was insufficient to support his conviction; once again, however, West did not attack the validity of Virginia's common law inference. (CA4 App. 16a, 19a-20a). United States District Judge James R. Spencer applied the constitutional standard established by this Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), and found that "there was sufficient evidence upon which a rational trier of fact could find West guilty beyond a reasonable doubt." Judge Spencer specifically noted West's attempt to explain his possession of the stolen goods, but concluded that "[i]t is clear from the evidence that the defendant was found in possession of recently stolen property, and that the jury did not believe his explanation." (App. 28).

On April 29, 1991, a panel of the Fourth Circuit reversed the district court, concluding that West's grand larceny conviction violated "due process." (App. 20). The panel did so only after expressing its "concern about the continued viability of the inference's basic premise," and its belief that the "premise [for the inference] has been substantially undercut by intervening technological and demographic developments," whatever that means. (App. 11-13). The court conceded, however, that the jury had been properly instructed with respect to the inference. (App. 20).

On May 10, 1991, the Commonwealth petitioned for rehearing with a suggestion for rehearing in banc. The

ten judges of the Fourth Circuit split 5 to 5 on whether to grant a rehearing in banc, and the Commonwealth's petition was thus denied. (App. 34-35). The court nevertheless stayed the issuance of its mandate so the Commonwealth could seek certiorari review in this Court. (App. 36).

REASONS WHY THE WRIT SHOULD BE GRANTED

THIS COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE THE DECISION BELOW.

This Court has emphasized that the interests of finality, comity and federalism are at the heart of federal review of state convictions under 28 U.S.C. § 2254. These important interests, however, cannot long survive if a federal appeals court is permitted to overturn a twelve-year-old conviction simply because it disagrees with a firmly-engrained principle of a state's common law.

For centuries, judges and juries have been permitted, as the jury was in West's case without objection, to infer that the possessor of recently stolen goods is the thief. Thus, where it was undisputed that West was found in exclusive possession of recently stolen goods, and where the jury clearly rejected West's attempt to explain such possession, the state court decisions affirming his grand larceny conviction against a sufficiency-of-the-evidence challenge were unquestionably reasonable. The Fourth Circuit's second-guessing of those decisions on the basis of its "concern" about the modern-day validity of the common law inference – a matter never raised by West in

state court or in the district court – simply cannot be squared with this Court's cases circumscribing the scope of federal collateral review.

A

CERTIORARI SHOULD BE GRANTED TO MAKE CLEAR ONCE AND FOR ALL THAT A FEDERAL COURT CANNOT SUBSTITUTE ITS JUDGMENT FOR A REASONABLE GOOD FAITH JUDGMENT REACHED BY THE STATE COURTS.

This Court announced the "new rule" doctrine in *Teague v. Lane*, 489 U.S. 288 (1989). Since then, the lower federal courts have had little difficulty applying the doctrine in cases where the petitioner is asking for retroactive application of a case decided since his conviction became final. See, e.g., *Bassette v. Thompson*, 915 F.2d 932, 938 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 1639 (1991).

But a ban on retroactive application of newly-decided cases is not the only precept of the "new rule" doctrine. When state courts make "reasonable, good-faith interpretations of existing precedents," a subsequent ruling to the contrary by a federal habeas court is, by definition, "new" and is thus prohibited. See *Butler v. McKellar*, 110 S.Ct. 1212, 1217 (1990), citing *United States v. Leon*, 468 U.S. 897 (1984) ("good faith" exception to exclusionary rule). It is *this* aspect of the "new rule" doctrine that the lower federal courts time and again have failed or refused to recognize; indeed the Fourth Circuit's decision in this case is a prime example of such misunderstanding of the doctrine's basic thrust. See also *Stamper v. Muncie*, ___ F.2d ___, ___ n.5, 1991 WL 156476 (4th Cir. 1991)

("Finding no error we leave to another day consideration of the Commonwealth's assertion" of the "new rule" doctrine); *Sanders v. Sullivan*, 900 F.2d 601, 605-606 (2d Cir. 1990) ("new rule" doctrine does not apply to state court's rejection of perjured-testimony claim); *Moore v. Zant*, 885 F.2d 1497, 1502-1503 (11th Cir. 1989) (ignoring "new rule" doctrine even though case had been remanded by this Court "for further consideration in light of *Teague v. Lane*"), *cert. denied*, 110 S.Ct. 3255 (1990).

"[T]he purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing examination of final judgments based upon later emerging legal doctrine." *Sawyer v. Smith*, 110 S.Ct. 2822, 2827 (1990). A federal habeas court, therefore, must "validate reasonable, good-faith interpretations of existing precedents made by state courts." *Saffle v. Parks*, 110 S.Ct. 1257, 1260 (1990).

Determining whether a state court's rejection of a petitioner's claim was "reasonable" and in "good faith" requires a determination whether constitutional precedent existing at the time the petitioner's conviction became final "compelled" a decision in his favor. *Saffle*, 110 S.Ct. at 1261. Acceptance of a petitioner's claim cannot be considered to have been "compelled," however, if it was "susceptible to debate among reasonable minds." *Butler*, 110 S.Ct. at 1217. And this Court has expressly cited as evidence that a claim is "susceptible to debate" the fact that the claim has been rejected by other courts. *Id.*

It would be difficult to imagine a more clear-cut violation of this component of the "new rule" doctrine than the decision of the court below.³ West's sufficiency claim was rejected by the state trial judge, all seven members of the Virginia Supreme Court, and a federal district court judge. Surely this concurrence of judicial opinion demonstrates, at the very least, that West's claim was not "dictated" or "compelled" in 1979 or now by *Jackson v. Virginia*.

The case upon which the Fourth Circuit relied, moreover, was not decided until more than two years after West's conviction became final. See *Cosby v. Jones*, 682 F.2d 1373 (11th Cir. 1982). This violation of the "new rule" doctrine is only highlighted by the fact that the *Jackson* "rational factfinder" test is *less* demanding of the prosecution than the "every reasonable hypothesis of innocence" standard that the Virginia Supreme Court applied to West's sufficiency claim on direct appeal. See *Inge v. Procunier*, 758 F.2d 1010, 1014 (4th Cir.), *cert. denied*, 474 U.S. 833 (1985).

The intrusive "second-guessing" indulged in by the Fourth Circuit is precisely the type of federal intervention the "new rule" doctrine was meant to proscribe. The

Court of Appeals conceded that its decision was "a judgment call" (App. 13-14) and that it represented a "disagreement on [a] fundamental matter with a properly instructed state jury of twelve, a state trial judge, the state's supreme court, and a federal district judge. . . . from a vantage point far removed from the immediacy of the testimonial evidence whose sufficiency is at issue." (App. 20). But after stating the very reason why federal courts must refrain from second-guessing state courts, the Fourth Circuit did *exactly* what it may not do: it substituted its own "judgment call" for the reasonable good faith judgment of the state courts.

The Court of Appeals' decision, moreover, is doubly intrusive because it is replete with references to a "growing discomfort . . . about allowing convictions in this day and age to be based solely upon [the common law] inference" and the court's belief that "the basic premise of the inference . . . has been substantially undercut by intervening technological and demographic developments." (App. 11-13). But the continued vitality of the common law inference was *never* challenged by West in state court. Nor for that matter was it ever mentioned by West in the district court.

The sufficiency claim West litigated on direct appeal in the Virginia Supreme Court expressly acknowledged the validity of the inference under Virginia law: "The law in Virginia is clear that the recent and exclusive possession of stolen property *will warrant a conviction of larceny unless the defendant affords a reasonable account of his possession.*" (CA4 App. 60a, *emphasis added*). West's claim in the Supreme Court of Virginia was *not* that the common law inference had lost any of its vitality, but

³ This Court has made clear that there are only two exceptions to the "new rule" doctrine. See *Sawyer*, 110 S.Ct. at 2831. The Fourth Circuit conceded that neither of these exceptions was applicable to West's claim (App. 9, n.3), but nevertheless held that the doctrine does not apply to sufficiency-of-the-evidence claims. (App. 10).

simply that "the inference of guilt which the Commonwealth may have established was rebutted" by his explanation at trial. (CA4 App. 61a). The Virginia Supreme Court rejected that claim, and West's conviction became final in 1980 when he failed to petition this Court for a writ of certiorari.

Seven years later, West initiated state habeas proceedings by filing a petition in the Virginia Supreme Court which raised the very same sufficiency claim he had raised on direct appeal. The petition said nothing about the continued validity of the common law inference. (CA4 App. 73a). The Supreme Court dismissed the sufficiency claim because it had already been rejected on direct appeal. (CA4 App. 80a, citing *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970)).

West, moreover, never even hinted, much less advanced, any allegation about the inference's modern-day applicability when he filed his petition in the district court. (CA4 App. 16a, 19a-20a). And when he later filed another pleading in the district court, he once again expressly conceded the validity of the inference under Virginia law. (CA4 App. 106a).

The district court's opinion shows no sign that West raised any concern about the strength of the common law inference in modern times. To the contrary, the district judge approached the allegation of insufficient evidence as a straightforward *Jackson* claim, applied the proper standard of review, and deferred to the jury's assessment of West's credibility as mandated by *Jackson*: "It is clear from the evidence . . . that the jury did not believe [West's] explanation." (App. 28).

On direct appeal, West did not attempt to seek certiorari review in this Court. If he had done so, this Court would have been without jurisdiction to review a claim challenging the modern-day validity of the common law inference because no such claim had been raised in the Virginia Supreme Court. See 28 U.S.C. § 1257; Rule 14.1(h). By granting West habeas relief on the basis of such a defaulted claim, the Fourth Circuit has afforded him "an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws." See *Coleman v. Thompson*, 111 S.Ct. 2546, 2554 (1991). Such an "end run" is totally at odds with the "new rule" and procedural default doctrines and, if left uncorrected, will have a ruinous effect on the vital State interests those doctrines were established to foster and protect.

B

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS, IN A COLLATERAL PROCEEDING, HAS EVISCERATED A DEEPLY-ROOTED PRINCIPLE OF COMMON LAW.

When a federal appeals court reverses a federal district court and grants collateral relief to a state prisoner only by reworking and emasculating a longstanding common law principle, this Court should exercise its certiorari power to restore the balance that our system of federalism demands. This is such a case.

The Fourth Circuit readily conceded that "[t]he inference that one found in unexplained possession of recently stolen goods was a participant in the theft is an ancient

one." (App. 11). See generally *Barnes v. United States*, 412 U.S. 837, 843-844 n.5 (1973), quoting Thayer, *Preliminary Treatise on Evidence* 328 (1898) ("[T]he laws of Ine [King of Wessex, A.D. 688-725] provide that, 'if stolen property be attached with a chapman, and he have not brought it before good witnesses, let him prove . . . that he was neither privy (to the theft) nor thief' "). See also 2 East's, *Pleas of the Crown* 656 (1716) ("Whenever the property of one man . . . is found (recently after the taking) upon another, it is incumbent on that other to prove how he came by it; otherwise, the presumption is, that he has taken it feloniously."). And, as the Fourth Circuit also conceded, the inference "has been widely employed . . . in our state and federal courts from earliest times." (App. 11). See, e.g., *Commonwealth v. Millard*, 1 Mass. 6 (1804). See also *Wilson v. United States*, 162 U.S. 613, 619-620 (1896).⁴

Virginia, of course, is a State with a long and still vibrant common law tradition, see Va. Code § 1-10, and the "recent possession" principle is deeply rooted in our law. "At least since 1872 Virginia juries have been instructed that the defendant's exclusive possession of recently stolen goods, if he offers no reasonable explanation, permits a presumption or inference that the defendant stole the goods." R. Groot, *Criminal Offenses and Defenses in Virginia* 222 (2d ed. 1989), citing *Price v. Commonwealth*, 62 Va. (21 Gratt.) 846, 869 (1872). See also *Carter*

⁴ Without attempting an exhaustive survey of the states, it is nevertheless clear that the common law inference presently retains widespread acceptance throughout the Nation. See generally Annot., 89 A.L.R.3d 1202 (1979).

v. Commonwealth, 209 Va. 317, 323-324, 163 S.E.2d 589, 594 (1968), cert. denied, 394 U.S. 991 (1969); *Bright v. Commonwealth*, 4 Va.App. 248, 251, 356 S.E.2d 443, 444 (1987).

In accordance with the common law, Virginia also recognizes that, if an accused thief such as West attempts to explain his possession of the stolen goods, it is solely the jury's province to determine the credibility of the explanation. See *Montgomery v. Commonwealth*, 221 Va. 188, 190, 269 S.E.2d 352, 353 (1980). The jury need not accept the defendant's explanation even if it is "not inherently incredible." *Id.* Moreover, as this Court itself held nearly a hundred years ago, if the jury concludes that the defendant has falsely "explained" his possession of the stolen goods, such falsehood can be construed by the jury as affirmative evidence of his guilt. See *Wilson*, 162 U.S. at 620-621 ("Nor can there be any question that, if the jury were satisfied . . . that false statements . . . were made by the defendant . . . they had the right . . . to regard [such statements] . . . as in themselves tending to show guilt.").

Let there be no mistake about exactly what the Fourth Circuit's ruling means: henceforth, a federal court is free to collaterally invalidate a state larceny conviction on sufficiency grounds, thereby barring even the possibility of retrial,⁵ simply by disagreeing with the jury's assessment of whether the defendant's explanation for his possession of the stolen goods was credible. As this Court's cases make clear, however, the legitimate interests of finality, comity and federalism cannot be so easily brushed aside. Given the inference's hoary pedigree, the

⁵ See *Burks v. United States*, 437 U.S. 1 (1978).

Court of Appeals' collateral evisceration of it in the name of "due process" is indefensible. See *Schad v. Arizona*, 111 S.Ct. 2491, 2507 (1991) (Scalia, J., concurring) ("Unless we are here to invent a Constitution rather than enforce one, it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is 'due.'").

C

CERTIORARI SHOULD BE GRANTED TO CORRECT THE COURT OF APPEALS' UNAUTHORIZED ALTERATION OF THE JACKSON V. VIRGINIA STANDARD.

A federal court reviewing a due process claim that the evidence was insufficient to support a state court conviction must be governed by the highly deferential standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, all the evidence must be viewed in the light most favorable to the prosecution, and the claim must be rejected unless no rational trier of fact could have concluded that the prisoner was guilty beyond a reasonable doubt. 443 U.S. at 319. *Jackson* expressly held that the reviewing court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* Indeed, *Jackson* requires that "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.* at 326 (emphasis added).

The decision of the Court of Appeals here clearly was not a straightforward application of *Jackson*. Under an unadorned *Jackson* analysis, any reviewing court would conclude, as the district court concluded (App. 27-28), that the jury could have reasonably determined that West had lied when he attempted to explain his possession. After all, it could have been perfectly obvious to everyone in the courtroom who saw and heard West's testimony, as the jury did, that the defendant's explanation was false. The Fourth Circuit, however, vacated West's conviction because in its judgment "there was nothing inherently implausible about [West's] explanation," his account "could not fairly be treated as positive evidence of guilt," and "was, at most, a neutral factor in assessing the probative force of the inference." (App. 18-19, emphasis added).

Thus, the court below was able to grant West relief only by fundamentally altering the *Jackson* standard. Instead of faithfully applying *Jackson*, the Court of Appeals adopted as its own the five-part analysis previously articulated by another court of appeals in *Cosby v. Jones*, 682 F.2d 1373 (11th Cir. 1982). Under this improperly diluted standard, the jury's assessment of credibility is hardly given the "full play" and deference demanded by *Jackson*. Instead, the credibility of the defendant's explanation is relegated to merely one facet of the five-part analysis, and even then the "standard" is couched in terms of "[w]hether the explanation given by the defendant, even if discredited by the jury, was 'not so implausible or demonstrably false as to give rise to positive evidence in favor of the government.'" (App. 15, emphasis added, citation omitted).

In a case such as *West's* where it is undisputed that the jury was properly instructed regarding the common law inference (App. 20), and that the defendant's possession of the stolen goods was both recent and exclusive, the jury's resolution of the case necessarily will turn on whether the defendant explains his possession, or if an explanation is made, whether that explanation is credible. After reading *West's* rather transparent trial testimony (CA4 App. 169a-179a), any court reviewing this case under the *Jackson* standard should have conceded that a rational jury could have found *West's* explanation incredible. The Fourth Circuit, however, substituted its own assessment of *West's* credibility for the jury's, and converted what is properly a determinative factor into a merely "neutral" one.⁶

This Court should exercise its certiorari power and summarily reverse the Court of Appeals' unauthorized amendment of the deferential standard this Court established in *Jackson*. See 443 U.S. at 319 n.13 ("[T]he standard

⁶ Other disturbing aspects of the Fourth Circuit's analysis are its dubious conclusions that the stolen goods "were found in 'plain view' in a search of *West's* residence" by the police, and that the inference in this case was "weakened" by the fact that *West* was found in possession of only a portion of the goods stolen from the victim's home. (App. 16-17). A thief who stores the fruits of his crime within his home should not be given "bonus points" merely because the stolen goods are left within sight of anyone he permits to enter. And, as to the latter conclusion, under Virginia law it has long been held that a jury "may infer the stealing of the whole from the possession of part." See *Henderson v. Commonwealth*, 215 Va. 811, 813, 213 S.E.2d 782, 784 (1975), quoting *Johnson v. Commonwealth*, 141 Va. 452, 456, 126 S.E. 5, 7 (1925).

announced today does not permit a court to make its own subjective determination of guilt or innocence."). Like the "new rule" and procedural default doctrines, *Jackson's* mandate of deference is premised upon considerations of finality, comity and federalism that cannot be jettisoned merely because a federal court disagrees with the state courts' proper resolution of a prisoner's constitutional claim.

More than nine years ago, two Members of this Court observed that there has been "a series of cases in which federal courts retry issues of fact and credibility." *Anderson v. Fuller*, 455 U.S. 1028, 1032 (1982) (Burger, C.J., and O'Connor, dissenting). When this Court denied certiorari in *Fuller*, the dissenters warned that the lower federal courts' refusal to apply *Jackson* properly "threatens to lead to reversals of state-court criminal convictions whenever a federal court chooses to sit as a jury and set aside the lawful jury's findings of fact." *Id.* at 1033.

That dire prediction has become reality in the instant case. Here, as in *Fuller*, "the federal judges who set aside this state-court judgment acted like jurors, not jurists." *Id.*

CONCLUSION

This Court should grant certiorari and the judgment of the Court of Appeals should be summarily reversed.

Respectfully submitted,

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September, 1991

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PETITIONERS' APPENDIX

App. 1

**PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 89-6686

FRANK ROBERT WEST, JR.,

Petitioner-Appellant,

versus

ELLIS B. WRIGHT, JR., Warden;
MARY SUE TERRY,
Attorney General of Virginia,

Respondents-Appellees.

Appeal from the United States District Court for the
Eastern District of Virginia, at Richmond. James R.
Spencer, District Judge. (CA-88-412-R)

Argued: July 18, 1990

Decided: April 29, 1991

Before ERVIN, Chief Judge, and PHILLIPS and MUR-
NAGHAN, Circuit Judges.

Reversed and remanded by published opinion. Judge
Phillips wrote the opinion, in which Chief Judge Ervin
and Judge Murnaghan joined.

ARGUED: Cynthia Mazur, Student Counsel, APPELLATE LITIGATION CLINICAL PROGRAM, Georgetown University Law Center, Washington, D.C., for Appellant. Marla Lynn Graff, Assistant Attorney General, Richmond, Virginia, for Appellees. **ON BRIEF:** Steven H. Goldblatt, Director, Joseph Lombard, Patricia Mariani, Heidi Mason, Student Counsel, APPELLATE LITIGATION CLINICAL PROGRAM, Georgetown University Law Center, Washington, D.C., for Appellant. Mary Sue Terry, Attorney General of Virginia, Richmond, Virginia, for Appellees.

PHILLIPS, Circuit Judge:

Frank Robert West, Jr., appeals the dismissal of his petition for a writ of habeas corpus in which he challenged the sufficiency of the evidence to convict him of grand larceny in a prosecution by the Commonwealth of Virginia. We reverse and remand for the issuance of the writ.

I

On December 13, 1978, Angelo Cardova left his vacation home in Westmoreland County, Virginia. Thirteen days later, on December 26, 1978, he returned to find that his house had been burglarized and that various items, totalling about \$3,000 in value, were missing. On January 10, 1979, law enforcement officers investigating another theft were allowed by West's wife to enter and search West's residence while West was incarcerated on other charges. In the course of this warrantless search, they seized some of the items stolen two to four weeks earlier

from Cardova's residence. Presumably for use as evidence they took away these items along with others. The items determined to be Cardova's included two television sets, a mirror framed with shells, a wood carving, groceries, a synthetic fur coat with the name Esther embroidered in the lining, a silk jacket decorated with the legend "Korea 1970," a mounted lobster and several other specifically identified pieces of property. The value of the Cardova items found in West's residence was about \$1,100.

West was charged in a state prosecution with grand larceny, the felonious taking, stealing, and carrying away of over \$100 in property. Va. Code Ann. § 18.2-95 (Repl. Vol. 1975).¹

At trial, the prosecution presented the testimony of six witnesses. Cardova testified as to the timing of the theft and the nature and value of the property taken from his home. West's sister, who owned his residence, and his neighbor both testified that West was the sole inhabitant of the residence in which the property was found. The prosecution also presented the testimony of three law enforcement officials establishing the chain of custody for the Cardova property after it was seized by the police.

Testifying on his own behalf, West of course denied the theft and explained his possession as the result of purchases from flea markets at which he regularly bought and resold merchandise. He recalled having purchased some of the items at issue at a flea market from one

¹ The statutory minimum value has since been raised to \$200. See Va. Code Ann. § 18.2-95 (Repl. Vol. 1988).

Ronnie Elkins. He specifically recalled one transaction in the amount of five dollars and another for five hundred dollars. West was unsure about the flea market at which he had purchased the items from Elkins. He explained that he did not produce Elkins as a witness because he did not know until the day of the trial which items he had been charged with stealing. His testimony was somewhat confused and he was unable to account for how he acquired some of the merchandise.

The Commonwealth presented no rebuttal evidence. In closing argument, the defense argued that the Commonwealth had failed to present any direct evidence that West had stolen any items from the Cardova house. The Commonwealth, in closing, relied exclusively on Virginia's common law permissive inference that one in unexplained possession of recently stolen goods is himself the thief. It argued that West offered no reasonable explanation for his possession of the goods. The judge stated in his instruction:

If you believe from the evidence beyond a reasonable doubt that property of a value of \$100.00 or more was stolen from Angelo F. Cardova, and that it was recently thereafter found in the exclusive and personal possession of the defendant, and that such possession has been unexplained or falsely denied by the defendant, then such possession is sufficient to raise an inference that the defendant was the thief; and if such inference, taking into consideration the whole evidence, leads you to believe beyond a reasonable doubt that the defendant committed the theft, then you shall find the defendant guilty.

The jury found West guilty and sentenced him to ten years imprisonment.

During the course of the trial, West raised the issue of evidentiary sufficiency several times. At the close of the Commonwealth's case, West moved the court to strike the evidence that had been presented because Virginia had not proven West was the one who "collected these items and carried them off," and had offered no evidence to prove that West was the "active agent" who committed the larceny. He renewed his motion to strike the evidence at the close of West's case. After the jury rendered its verdict, he again renewed the motion to strike and also moved for the court to "set aside the verdict as being contrary to the law and the evidence." On direct appeal, as well as in a later state habeas corpus proceeding, West again alleged that the evidence was not sufficient to convict him of larceny and that the Commonwealth did not prove his guilt beyond a reasonable doubt. He was denied relief both on direct appeal and in his state habeas proceeding.

West then brought this habeas corpus proceeding under 28 U.S.C. § 2254 in the United States District Court, challenging on constitutional grounds the sufficiency of the evidence to convict him. The district court dismissed the petition by summary judgment, concluding that the evidence was sufficient to convict under the appropriate constitutional standard.

This appeal followed.

II

We first address two threshold objections by the Commonwealth to the consideration of this federal habeas petition. The first is that West's claim challenging the sufficiency of the evidence has not been exhausted in the state courts. The second is that its favorable consideration by a federal habeas court would involve the adoption of a "new rule" and that its consideration is therefore forbidden by *Teague v. Lane*, 489 U.S. 288 (1989).

In order to address these objections, it is necessary to identify the exact nature of West's constitutional claim. Though the claim undisputably is one that ultimately challenges the constitutional sufficiency of the evidence to convict, the parties disagree on the significance of the use of the permissive inference in defining the exact nature of that challenge.

The Commonwealth characterizes the challenge as being one to the facial constitutionality of the inference. West characterizes it as simply a classic due process challenge to the sufficiency of the evidence (here that used to invoke the inference) to convict him of larceny. We agree with West.

While the circumstances under which a "facial" challenge to the constitutionality of such a permissive inference can be made may not be entirely clear,² two of its identifying features are. West's claim has neither.

² See *County Court of Ulster County v. Allen*, 442 U.S. 140, 155-63 (1979); *Barnes v. United States*, 412 U.S. 837, 841-46 (1973).

The first is that a "facial" challenge is directed at the jury instructions that allow the jury to draw the inference, not at the sufficiency of the specific evidence to convict. See *Barnes v. United States*, 412 U.S. 837, 841-43 (1973) (reviewing cases illustrating this mode of "facial" challenge). The second is that the standard for assessing such a challenge is the "more-likely-than not" standard of rationality developed in the line of cases, *Turner v. United States*, 396 U.S. 398 (1970); *Leary v. United States*, 395 U.S. 6 (1969); *United States v. Gainey*, 380 U.S. 63 (1965); and *Tot v. United States*, 319 U.S. 463 (1943), see *Barnes*, 412 U.S. at 842, rather than the more stringent "beyond-a-reasonable-doubt" standard for assessing the sufficiency of particular evidence to convict laid down in *Jackson v. Virginia*, 443 U.S. 307 (1979).

From this it is apparent that West's claim is not one to the facial constitutionality of the inference. Inferentially, he concedes that. He raises no challenge to the jury instructions as such. Throughout, his challenge has been to the sufficiency of the evidence to take the case to the jury under any jury instructions. Where, as here, the only evidence of guilt consists of the "basic facts" of the inference, such a challenge is perforce a straightforward challenge to the sufficiency of that evidence alone to convict under the *Jackson v. Virginia* test. See *County Court of Ulster County v. Allen*, 442 U.S. 140, 166-67 (1979) (where only evidence of guilt is that giving rise to permissive inference, basic facts of inference must meet beyond-reasonable-doubt standard rather than less stringent more-likely-than-not standard); *Cosby v. Jones*, 682 F.2d 1373, 1377 n.9 (11th Cir. 1982) ("a *Jackson v. Virginia* test is

still necessary even though a permissive inference instruction is valid").

With the nature of the challenge thus identified, we turn to the Commonwealth's threshold objections to its consideration in this habeas proceeding.

A

Once properly characterized, it is apparent that West's constitutional claim has been adequately exhausted in the state courts. The Commonwealth's contention that it has not been rests on the erroneous premise that it involved a constitutional challenge to the facial validity of the permissive inference. As indicated, it is not that, but is a straightforward due process challenge to the sufficiency of the evidence (in this case consisting solely of the basic facts of the inference) to convict.

In the trial court, as earlier noted, West raised sufficiency of the evidence challenges at several points: (1) by moving at the close of the Commonwealth's case to "strike the evidence" for failure to prove he was the "active agent" in the theft, J.A. at 166a; (2) by renewing this motion at the close of all the evidence, J.A. at 180a; (3) by renewing the motion after return of the jury verdict, J.A. at 204a; and (4) by moving after imposition of sentence to "set aside the verdict as contrary to the law and the evidence," J.A. at 204a.

He then pursued this claim by an assignment of error on direct appeal and later by raising it in his state habeas proceeding. In both proceedings he asserted that the evidence was insufficient to convict him and that the Commonwealth had not proved his guilt beyond a reasonable doubt. J.A. at 46a, 73a.

At all these stages, West adequately alerted the state courts that he was raising a constitutional claim. Any challenge to the sufficiency of the evidence to convict in a state prosecution is necessarily a due process challenge to the conviction. *Jackson v. Virginia*, 443 U.S. 307, 321 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). The fact that West did not couch his objections and challenges in state court in specific constitutional terms is of no consequence; it is not necessary to cite "book and verse on the federal constitution" so long as the constitutional substance of the claim is evident. *Picard v. Connor*, 404 U.S. 270, 278 (1971); *Hawkins v. West*, 706 F.2d 437, 439 (2d Cir. 1983) (claim in state court that "case fell far short of that required to prove . . . guilt beyond a reasonable doubt" adequately raises due process claim).

West's challenge to the sufficiency of the evidence under the federal due process clause to convict him thus has been properly exhausted in the state courts.

B

Similarly, once West's constitutional claim is properly characterized, it is apparent that to uphold it in this federal habeas corpus proceeding would not be to impose a "new constitutional rule" in violation of the *Teague v. Lane* limitation on federal collateral review.³

³ *Teague v. Lane*, modifying preexisting retroactivity principles, prohibits (with exceptions not relevant here) federal

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Here again, the Commonwealth's contention that it would violate *Teague's* "no new rule" prohibition is based on the erroneous premise that West challenges the facial validity of Virginia's permissive inference. If that were the claim, it might be arguable that its vindication would violate the "no new rule" limitation, for such a rule would prohibit further use of the ancient inference *in any circumstances*, on the basis that it facially violated the "more likely than not" test of rationality. As indicated, that is not the basis of West's claim which, instead, is simply that allowing the inference to be drawn by the jury *on the facts of this case* violated the proof-beyond-a-reasonable-doubt test of *Jackson v. Virginia*. Obviously, a federal habeas court cannot be said to apply a "new constitutional rule" whenever it applies the *Jackson v. Virginia* test to a "new" set of facts in evidence.

Hence, West's claim properly may be considered in this federal habeas proceeding free of the *Teague v. Lane* limitation.⁴

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courts from announcing in collateral review of state court convictions any rule of criminal procedure whose result "was not *dictated* by precedent existing at the time the [habeas petitioner's] conviction [in state court] became final." 489 U.S. at 301 (emphasis in original). In other words, it shields the final criminal judgments of state courts from being overturned by the adoption on collateral federal review of constitutional rules not in effect at the time of the state court judgment.

⁴ By this we are simply saying that the result sought by the petitioner here is one that *was dictated* by constitutional precedent, that of *Jackson v. Virginia*, at the time West's state

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III

Turning to assessment of the evidence under the *Jackson v. Virginia* standard, we first note some general features of the permissive inference here used to convict West.

The inference that one found in unexplained possession of recently stolen goods was a participant in the theft is an ancient one. In use in the English courts as long ago as the early eighteenth century, it has been widely employed in one form or another in our state and federal courts from earliest times. See *United States v. Jones*, 418 F.2d 818, 821 (8th Cir. 1969) (tracing origins and uses of inference).

While the general, "run-of-cases," rationality of the inference may seem pretty clear on an intuitive basis, even that is not as clear today as it was in the days of its origins. As courts have noted in more recent times, the basic premise of the inference at its origins was the limited mobility of goods, and that premise has been substantially undercut by intervening technological and demographic developments. See *Commonwealth v. Turner*, 317 A.2d 298, 300 (Pa. 1974) (citing "advent of densely populated communities, revolutionary advances in communication and transportation, . . . increased mobility" as

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court conviction became final. *Jackson* was decided on June 28, 1979; West's state court conviction became final, for *Teague v. Lane* purposes, on May 30, 1980, when the Supreme Court of Virginia, finding no reversible error, denied leave to appeal. See *Teague*, 489 U.S. at 293, 311 (noting conviction final when Supreme Court denied certiorari).

reason for reexamination of inference's premises). Largely in consequence, a number of federal and state courts have come over the years to caution extreme care in its use or have actually modified it in ways which severely constrain its use. See, e.g., *Jones*, 418 F.2d at 823 (inference may be used in federal prosecution only when "corroborated by other circumstantial factors"; conviction of bank robbery reversed where only evidence was exclusive possession of bank bills stolen a day earlier); *United States v. Bamberger*, 456 F.2d 1119, 1134 (3d Cir. 1972) (inference only justified in presence of factors suggesting property could only have been obtained through theft); *State v. Heath*, 492 P.2d 978, 979 (Utah 1972) (requiring corroboration); *Turner*, 317 A.2d at 300-01 (suggesting that "recent possession" must be defined as being so recent that thief could not have divested himself of property); see also *State v. Smith*, 24 N.C. (2 Ired.) 402, 408-09 (1842) (admonishing that such inferences "even in the strongest case are to be warily drawn").

These decisions of course simply reflect the growing discomfort which some courts have felt about allowing convictions in this day to be based solely upon this inference. None has purported to put its blanket rejection of the inference on constitutional due process grounds. Indeed, we may assume, without deciding, for purposes of this case that its use is not facially unconstitutional under the more-likely-than-not test of "rational connect-edness."⁵

⁵ *Barnes v. United States*, 412 U.S. 837 (1973), upholding against a facial challenge the closely related common law

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Nevertheless, the refusal of these courts, on nonconstitutional grounds, to countenance further use of the inference as the sole basis for conviction under *any* circumstance speaks strongly to the wariness with which its use in a particular case should be assessed under the *Jackson* constitutional standard. Every legitimate concern about the continued viability of the inference's basic premise which has led some courts to reject its use in any circumstances applies to its use in particular cases in jurisdictions such as Virginia that still allow it.

Application of the *Jackson v. Virginia* due process test – "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson*, 443 U.S. at 319 – is necessarily an evidence-specific judgment call. That test of course presupposes that juries accurately charged on the elements of a crime and on the strict burden of persuasion to which they must hold the prosecution, nevertheless "may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt."

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inference of guilty *knowledge* from unexplained possession following recent theft, may suggest, though it does not compel, this assumption. As has been observed, the inference from these basic facts of knowledge is a much stronger one than is the inference of participation. See *Cosby v. Jones*, 682 F.2d 1373, 1381 (11th Cir. 1982).

In any event, because West's challenge is not to the facial constitutionality of the inference of theft, that issue is not before us.

Id. at 317. It was adopted to provide an additional safeguard against that possibility, and to give added assurance that guilt should never be found except on a rationally supportable "subjective state of near certitude." *Id.* at 315.

As indicated, the evidence here consisted entirely of that establishing, without real dispute, the basic facts of the common law inference: that about one-third in value of goods stolen between December 13 and December 26, 1978, were found on January 10, 1979, in the exclusive possession of the petitioner West, coupled with petitioner's own testimony explaining his possession as having come about by purchases in the interval. There was nothing in the specific evidence of the theft or the petitioner's later possession that added any further probative force to those bare facts. That is to say, there was no evidence at the theft site more specifically suggesting West's presence there – no fingerprints or footprints, sightings in the vicinity, other tracings of presence, or the like, nor was there at the site of discovered possession any physical indicia, such as soil samples or the like, suggesting West's presence at the theft site.

The evidence therefore poses a classic problem of applying the *Jackson v. Virginia* test to assess the sufficiency of essentially bare, unadorned evidence of recent theft and exclusive possession to convict one of the theft. While this, as indicated, in the end requires a judgment call, at least one court has suggested a principled way in which to approach it. The process suggested is one based on the realization that even essentially bare evidence of theft and ensuing possession necessarily will have some contextual factors pointing toward or away from guilt,

and that assessment should focus on these factors in order to test the inferential force of the specific evidence used to invoke the inference in a particular case.

In *Cosby v. Jones*, 682 F.2d 1373 (11th Cir. 1982), the court collaterally reviewed a state burglary conviction in which the sole evidence of guilt consisted of the basic facts of the common law inference, specifically, that the petitioner attempted to pawn one of a number of stolen items of property within a few days after the theft. Applying the *Jackson v. Virginia* standard in habeas review, the court identified the following contextual factors as critical to assessment of the probative force of the particular evidence of theft and possession:

- (a) Whether the possession was recent, relative to the crime;
- (b) Whether a large majority of the items stolen in the theft were found in the defendant's possession;
- (c) Whether the defendant attempted to conceal the stolen items in his possession;
- (d) Whether the explanation given by the defendant, even if discredited by the jury, was "not so implausible or demonstrably false as to give rise to positive evidence in favor of the government";
- (e) Whether there is other corroborating evidence to support the conviction.

Id. at 1382-83.

Assessing the evidence on that basis, the *Cosby* court found it insufficient to convict under *Jackson's* test of rationality. Because we think this analytical framework is

sound, we adopt it for assessing the evidence here. Because we think *Cosby's* analysis also sound, we draw on it, factor by factor, for comparative purposes in the course of analyzing the evidence upon which West was convicted.

In *Cosby*, the items found in the petitioner's possession, a camera and lens, had been stolen only a few days earlier. Although that theft was relatively recent, the court properly noted that given the nature of the item, "it was not so recent that it is unlikely that [petitioner] could have purchased it." *Id.* at 1382.

In the instant case, the theft from Cardova's residence occurred sometime during a period of two to four weeks before some of the stolen items were found in West's possession. As in *Cosby*, given the nature of the stolen items, this theft was not so recent that a purchase in the interval could not have been likely.

In *Cosby*, only a camera and lens had been found in the petitioner's possession, whereas a stereo in addition had been stolen. The *Cosby* court properly noted that this disparity tended to weaken the inference.

In the instant case, the items found in West's possession made up only a third in value of those stolen from Cardova. As in *Cosby*, this disparity tends to weaken the inference.

In *Cosby*, rather than attempting to conceal the items found in his possession, the petitioner's possession was detected as he attempted to pawn them in the open market. The *Cosby* court rightly noted that this tended strongly to blunt the inference.

In the instant case, the evidence on this factor is not so affirmatively favorable to petitioner, but assessed independently, it is at best neutral and, if anything, favorable to him. The stolen items at issue here were found in "plain view" in a search of West's residence. No evidence as to their exact location in the residence was offered by the Commonwealth. Given the potential probative force of evidence that they were concealed within the residence, it may plausibly be assumed that they were not.

The next factor in the *Cosby* analysis concerns the explanation, if any, proffered by the accused. This factor of course derives from the fact that, as explained in the trial court's instructions to the jury, the inference of theft might be drawn only if the jury found beyond a reasonable doubt that any possession proved "has been unexplained or falsely denied by the defendant." This element of the common law inference has the effect of shifting the burden of production to the defendant to explain his possession, thereby imposing the risk that failing to explain or giving an implausible or effectively refuted explanation may result in the inference of guilt being drawn specifically for that reason.⁶ As applied by Virginia, and generally, this inference is not the type dissipated ("burst") by a defendant's mere proffer of explanation; it may still be drawn by the jury's rejection

⁶ An effect that we may assume, though we do not decide, is itself constitutionally permissible in the use of this inference. See *Barnes*, 412 U.S. at 846 n.11 (shifting burden of production permissible if there is a "rational connection" between the basic facts and inferred facts of a permissive criminal inference). We need not decide this question here, because, as earlier noted, the inference itself has not been challenged on that basis.

of the explanation, see *Barnes*, 412 U.S. at 845 n.9; *Montgomery v. Commonwealth*, 269 S.E.2d 352, 353 (Va. 1980), but it is an inference almost certain to be drawn if a plausible explanation is not proffered.

This may well have been the strongest factor in petitioner's favor in *Cosby*, for his testimonial explanation that he had bought the stolen items from a man on the street was corroborated by an eyewitness, and was never directly refuted by the prosecution. The *Cosby* court reasonably concluded that though this explanation obviously was rejected by the jury, it was not so facially implausible or demonstrably false as to serve as positive evidence of guilt.

In the instant case, West's testimonial explanation also was of purchase in the interval. Unlike the situation in *Cosby*, there was no third person testimony corroborating this explanation and on cross-examination West exhibited confusion about the exact circumstances of some of the purchases. But he maintained his general explanation that he had purchased all the items at flea markets, and there was nothing inherently implausible about this explanation, including West's confusion about some of its details, nor did the prosecution directly refute it in any of its specifics.⁷

⁷ West's general explanation, given in testimony some five months after the events in issue, was that he regularly bought and sold items in various flea markets in the area, and that this was how he came into possession of the stolen items found in his residence. He identified only one individual seller, a Ronnie Elkins, from whom he claimed to have bought items.

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As did the *Cosby* court, we therefore conclude that the petitioner's proffered explanation could not fairly be treated as positive evidence of guilt, and was, at most, a neutral factor in assessing the probative force of the inference.⁸

(Continued from previous page)

Pressed for details on cross-examination, he was unable to remember exactly where he had bought specific ones of the items, and was uncertain in particular about where his purchases from Elkins occurred and the exact items involved in those purchases. Questioned as to why Elkins had not been subpoenaed as a witness, West responded that he had not known until trial the particular items among those taken from his residence that he was charged with stealing from Cardova. While at first blush this collateral explanation may itself seem incredible, thereby drawing all else in question, it becomes more plausible when the circumstances of the items' seizure by law enforcement officers are considered. They were taken, along with a number of other items, from West's residence while he was incarcerated on another charge and, so far as the record shows, he therefore could have been unaware until trial of the exact items taken from his residence that allegedly were stolen from Cardova. The Commonwealth's indictment did not identify them except as "property of Angelo Cardova having a value of \$100 or more," and while the Commonwealth suggests that West must have known because of "discovery motions by defense counsel," no such discovery motions and responses or other evidence were offered to the trier of fact in rebuttal of his testimony.

⁸ An interesting contrast with West's facially plausible explanation of his possession may be found in one found so implausible as to amount to positive evidence of guilt in another, post-*Cosby*, Eleventh Circuit case, *United States v. Eley*, 723 F.2d 1522 (11th Cir. 1984) (that unknown truck driver had turned over to defendant the trailer of a disabled eighteen-wheeler rig to be towed to a distant truck stop).

The final factor in the *Cosby* analysis is whether there was any evidence other than the basic facts of recent theft and exclusive possession that tended to "corroborate" the inference. There was none in *Cosby*, and there is none in our case. As indicated, the record here is a classic example of guilt being found on no other basis than the inference that could be drawn from evidence that a theft was followed by the discovery some two to four weeks later of a portion of the stolen goods in the exclusive possession of a defendant who offered an exculpatory explanation for his possession that was neither facially implausible nor directly refuted by any conflicting evidence.

We therefore conclude, as did the court in *Cosby*, that the evidence here, assessed in its entirety and in the light most favorable to the prosecution, was not sufficient to persuade any rational trier of fact of this petitioner's guilt, that his conviction on that evidence therefore violated his constitutional right to due process, and that he is entitled to the relief sought in this habeas corpus proceeding.

A determination in federal collateral review that a state court conviction by jury verdict was not supported by constitutionally sufficient evidence is one to be made with special caution and anxiety. Where, as here, it is made in the process of reversing a federal district court, it involves disagreement on this fundamental matter with a properly instructed state jury of twelve, a state trial judge, the state's supreme court, and a federal district judge. And it involves disagreement from a vantage point far removed from the immediacy of the testimonial evidence whose sufficiency is at issue. Indeed, there may be

no more delicate constitutional determination in federal collateral review, given its unique rejection not only of state judicial rulings but of state jury findings. Aware of its special delicacy when viewed in this stark way, we nevertheless have felt obliged under the constitutional test we apply to make that determination here. In doing so, we think it not amiss to suggest that if we are right – as of course we must believe we are – in so disagreeing with these others, it may well be mainly because of the high quality of advocacy in behalf of the habeas petitioner that was first made available to him in this court.

We also think it proper, in view of the ancient lineage and presumably frequent use in Virginia courts of the common law inference here in issue, to emphasize the narrowness of our decision as it deals with that issue. We do not hold either that the inference may not be used under any circumstances (because facially unconstitutional under the more-likely-than-not test), nor, on the other hand, that, if properly challenged, it would pass muster under that test. Because its use on that basis has not been challenged, we have not been required to address that issue nor the preliminary one whether under *Teague v. Lane* a habeas court could appropriately consider it if it were raised. These remain as open issues respecting the use of this inference, for we hold only that the specific evidence used to invoke the inference of guilt here failed to meet the beyond-a-reasonable-doubt test of *Jackson v. Virginia*.⁹

⁹ In view of this holding, we need not address West's further constitutional claim that he was denied due process by

We therefore remand the proceeding to the district court with directions to issue the writ vacating West's conviction.

SO ORDERED

(Continued from previous page)

the failure of the state courts to order a new trial on the basis of an unsworn "affidavit" submitted by Ronnie Elkins in 1987, which generally corroborated West's testimony that he had bought some of the allegedly stolen property from Elkins. J.A. 77a-78a.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FRANK ROBERT WEST, JR.

v.

ELLIS B. WRIGHT, WARDEN,
et al.

CIVIL

ACTION

NO. 88-0412-R

(Filed Jun. 1, 1989)

MEMORANDUM

Frank Robert West, Jr., a Virginia state prisoner proceeding *pro se*, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He seeks to contest his conviction in the Circuit Court of Westmoreland County, Virginia, of grand larceny. Jurisdiction is appropriate pursuant to 28 U.S.C. § 2254. Respondents have filed their answer with attached affidavits and records, and petitioner has responded thereto. The matter is ripe for disposition.

Petitioner raises the following grounds for relief:

1. The Court erred in allowing the motion to suppress to be heard without three (3) witnesses summoned by the defendant.
2. The Court erred in denying the defendant's motion to suppress the evidence for the reasons set forth in the record of the hearing on said motion.
3. The Court erred in denying the defendant's motion to suppress. The seizure was illegal because law enforcement officers were without jurisdiction or authority to act.

4. The Court erred in denying defendant's motion to strike the prosecution's evidence at the close of the defendant's case. The evidence presented at the trial of the defendant was not sufficient at law to convict him of the offense alleged in the indictment.
5. The Court erred in refusing to set aside the jury verdict because the Commonwealth did not carry the burden of proving the guilt of the defendant beyond a reasonable doubt.
6. The Court erred in allowing Angelo Cardova to show members of the jury photographs of allegedly stolen and recovered property before said photographs had been introduced into evidence.
7. There was a concerted effort on behalf of the Commonwealth and the police department to withhold evidence that would have changed the outcome of the trial in that a search for Ronnie Elkins was never initiated. (See T. direct and cross of Frank West.)
8. The trial counsel for the defendant was ineffective in that:
 - (a) Counsel for the defendant failed to investigate facts brought to his attention by the defendant concerning Ronnie Elkins and his part in the matter. This failure to investigate facts left the burden of proof almost completely on the defendant instead of the Commonwealth.
 - (b) Counsel failed to object to certain areas of questioning and evidence that would have been objected to had counsel investigated the facts given to him by

the defendant concerning Ronnie Elkins. Appropriate objections would have changed the outcome of the trial.

9. Petitioner is entitled to relief because of newly discovered evidence: the affidavit of Ronnie Elkins supports petitioner's trial testimony.

In his first three grounds for relief, petitioner West seeks to attack the decision of the Circuit Court of Westmoreland County denying his motion to suppress. Ordinarily, a prisoner may not collaterally attack a state conviction on grounds that illegally seized evidence was admitted at trial. *Stone v. Powell*, 428 U.S. 465, 493-95 (1976). Nevertheless, if it appears that the state has not afforded petitioner "an opportunity for full and fair litigation of a Fourth Amendment claim," federal courts will entertain such an action. *Id.* at 494. Thus, the first inquiry must be whether the existing state procedure afforded petitioner an opportunity to raise his claim before the trial court. *Doleman v. Muncy*, 579 F.2d 1258, 1265 (4th Cir. 1978).

The record reflects that a motion to suppress was filed in the circuit court in the instant case. The matter came on for a hearing on June 8, 1979. At that time counsel for the defendant requested a continuance in order to obtain the presence of Howard Wray, a Chesterfield investigator, on grounds that his testimony would be critical to the motion.¹ Other than the need to have Mr.

¹ The suppression hearing was a consolidated hearing concerning the suppression of evidence as it might affect petitioner in two separate criminal actions. In the one he was

Wray present, counsel did not request the presence of any witnesses not then present. Those witnesses were placed upon their bond to appear at the next suppression hearing which was set for June 15, 1979. At the outset of the June 15 hearing, petitioner requested another continuance on grounds that three witnesses who had been summonsed were not present to testify. Counsel advised the Court, however, that the summonses had not been issued until the day before the hearing. When asked by the Court whether the witnesses were material, defense counsel stated that he thought the witnesses were important, but that their testimony would probably be cumulative to the testimony of other witnesses who were present. (T. 33, of June 15, 1979, proceedings). On that basis the Court denied the motion for a continuance, and the suppression hearing went forward.² The evidence at that hearing was in conflict. However, there was ample evidence that the defendant had given his wife the keys to his Gloucester home with the statement that she would know what to do with them; that the defendant and his wife were living together in Chesterfield County as man and wife; that defendant's wife was present on the premises searched; and that she executed a voluntary consent for the property to be searched. Petitioner was afforded

(Continued from previous page)

represented by F. Warren Haney, Jr., and in the other, the conviction presently under attack, he was represented by Michael C. Mayo. Mr. Haney moved for the continuance, and Mr. Mayo specifically joined in that motion.

² Petitioner West was attempting to suppress the stolen property discovered in the January 9, 1979, search of his residence.

ample opportunity to present witnesses to attack the voluntariness of the consent, the validity of his wife's authority to grant consent, and any other issues he wished to raise. Accordingly, petitioner was afforded an opportunity for a full and fair hearing on his Fourth Amendment claim. Consequently, Claim 1 through Claim 3 will be DISMISSED.

Next, in grounds 4 and 5, West seeks to attack the sufficiency of the evidence upon which he was convicted. The standard of review in habeas corpus actions is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The Commonwealth is not required to present a case that excludes every hypothesis of innocence. *Id.* at 326; *United States v. Bobo*, 477 F.2d 974, 989 (4th Cir. 1973), cert. denied, 421 U.S. 909 (1975).

In Virginia, larceny is the wrongful taking of personal goods, of some intrinsic value, belonging to another, without his permission, and with the intention to deprive the owner thereof permanently. See *Skeeter v. Commonwealth*, 217 Va. 722, 725, 232 S.E.2d 756, ___ (1977). Grand larceny is defined as larceny, not from the person of another, of goods and chattels of a value of \$200.00 or more. Va. Code § 18.2-95 (Repl. Vol. 1988). At the time of petitioner's conviction, the statute provided that grand larceny consisted of larceny of goods and chattels having a value of \$100.00 or more. Va. Code § 18.2-95 (Repl. Vol. 1975). Additionally, in Virginia, the unexplained or falsely explained possession of recently stolen property gives rise to an inference that the possessor was the

person who committed the larceny. See *Best v. Commonwealth*, 222 Va. 387, 389-90, 282 S.E.2d 16, ___ (1981); *Schaum v. Commonwealth*, 215 Va. 498, 501, 211 S.E.2d 73, ___ (1975).

The evidence at trial established that the residence of Mr. Angelo F. Cardova, in Westmoreland County, Virginia, was burglarized sometime between December 13 and December 26, 1978. On January 9, 1979, a search of petitioner's residence revealed many of the items stolen in the Cardova burglary. Mr. Cardova identified the items and testified as to their value. The aggregate value exceeded \$100.00, as did several individual items. Furthermore, there was evidence sufficient to establish that West exerted a possessory interest in the stolen property. Accordingly, the decision to deny a motion to strike the evidence at the conclusion of the Commonwealth's case for a lack of sufficiency of the evidence was properly denied. After denial of the motion, petitioner West took the stand and attempted to explain his possession of the property by testifying he had purchased it from Mr. Ronnie Elkins. However, he was not sure he had purchased all of the property from Mr. Elkins, nor could he identify where all of the property had been purchased.

It is clear from the evidence that the defendant was found in possession of recently stolen property, and that the jury did not believe his explanation. Federal courts do not sit to review the credibility of witnesses in habeas corpus proceedings. *Pigford v. U.S.*, 518 F.2d 831, 836 (4th Cir. 1975). Accordingly, there was sufficient evidence upon which a rational trier of fact could find West guilty beyond a reasonable doubt of grand larceny. Accordingly, grounds 4 and 5 will be DISMISSED.

In ground 6, petitioner objects to the testimony of Angelo Cardova, which included showing members of the jury photographs of the allegedly stolen property, before the photographs had been introduced in evidence. The respondents assert that petitioner is barred from raising this claim because of a procedural default. Procedural default bars consideration of federal claims when the last state court rendering a decision plainly and explicitly declares that its judgment rests on a state procedural bar. *Harris v. Reed*, 57 U.S.L.W. 4224, 4226-4227 (U.S. Feb. 21, 1989). Absent cause and prejudice, further federal review is precluded. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). Here the record reveals that petitioner failed to raise the instant claim by objecting at trial to the evidence. The Virginia Supreme Court, asserting a valid procedural rule, dismissed the claim. See *Slayton v. Parri-gan*, 215 Va. 27, 29, 205 S.E.2d 680, ___ (1974). Petitioner has failed to demonstrate either cause or prejudice for his failure to object. Claim 6 will be DISMISSED.³

Petitioner next alleges a concerted effort by the Commonwealth and the police department to withhold evidence. Specifically, he alleges that the Commonwealth and the police department never instituted a search for Ronnie Elkins, a witness who would have testified that he

³ In any event, the use of photographs for illustrative purposes is not error under Virginia law. See *Saunders v. Commonwealth*, 1 Va. App. 396, 398-99, 339 S.E.2d 550, ___ (1986). Moreover, absent "circumstances impugning fundamental fairness or infringing specific constitutional protections," the admissibility of evidence does not present a federal question. *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir. 1960); see also *Chance v. Garrison*, 537 F.2d 1212, 1215 (4th Cir. 1976).

had sold certain items of property to the defendant. The record reveals that the Commonwealth was not even aware of the existence of Mr. Ronnie Elkins until petitioner West's testimony at his criminal trial. It can hardly now be faulted for failing to institute a search for an unknown witness. Claim 7 will be DISMISSED.⁴

In Claim 8, petitioner alleges ineffective assistance of counsel.⁵ First he alleges that his attorney failed to investigate the facts concerning Ronnie Elkins and his part in the case. Respondents attached an affidavit from Michael C. Mayo, Esquire, West's attorney during the criminal trial, to their motion to dismiss filed with the Supreme Court of Virginia, on July 20, 1987. The affidavit recites

⁴ Respondents' argument that federal review of this claim should be barred because the Virginia Supreme Court asserted a procedural default is not well taken. The Virginia Supreme Court dismissed the claim solely because it found the claim conclusory. The record establishes that the petitioner was not notified to amend his petition, nor, apparently, was he afforded the opportunity to do so. While West's allegations before the Supreme Court of Virginia were not entirely fact specific, if the petition had been filed in a federal court, an answer would have been required from the respondents. Additionally, in federal court petitioner West would have been permitted to amend the petition if necessary to particularize his allegations. See *Raines v. United States*, 423 F.2d 526, 529 (4th Cir. 1970); *Coleman v. Peyton*, 340 F.2d 603, 604 (4th Cir. 1965), cert. denied, 385 U.S. 905 (1966). Virginia's interest in requiring habeas petitioners to allege specific facts to support their claims does not outweigh the federal interest in reviewing federal claims where the state has not given the petitioner the opportunity to particularize his allegations.

⁵ Respondents' argument that federal habeas review of this claim is precluded is rejected. See *supra*, note 4.

specific times upon which counsel inquired of Mr. West concerning any witnesses he desired for his criminal trial. Petitioner repeatedly advised counsel he had no witnesses. On June 18, 1979, petitioner told counsel he wished to take the stand in his own defense, but he would not tell his attorney the details of his testimony. Two days before commencement of the trial, petitioner advised counsel that he wished to have Larry Gentry, an inmate, subpoenaed as a witness for the January 21, 1979, trial. Mr. Gentry was ordered to appear and was available for testimony at the trial. Petitioner does not deny the averments in the affidavit. Indeed, petitioner admits in his September 21, traverse that he did not raise the issue of subpoenaing Mr. Elkins until his testimony at trial. He states:

Elkins was raised for the first time at trial due to counsel's failure to inform his client of what the [stolen] items were. Through that failure counsel denied the petitioner the right to have Elkins present at trial.⁶

⁶ Petitioner's statements that he did not know the items alleged to have been the subject of his arrest, indictment, and trial, is not believable. At the very least, he was aware that he was being charged with the theft of items which were found in his Gloucester home. It is certainly not unreasonable to expect a client who does not know the nature of the charges against him to ask the specifics from his attorney. Nor is it unreasonable to expect petitioner to have advised his attorney of the source of the recently obtained property stored in his Gloucester home. The record also reveals that West was served with a warrant setting forth the specific items alleged to have been stolen. While petitioner may not have seen the particular items

(Continued on following page)

Moreover, petitioner West has failed to show how he was prejudiced by his attorney's failure to investigate the possibility of subpoenaing Mr. Elkins. Petitioner himself states that he had to search for years to find Mr. Elkins. His own averments indicate the futility of requiring his attorney to locate Mr. Elkins in the short time between indictment and trial. Additionally, to the extent that petitioner argues that his attorney permitted a shifting of the burden of proof, the record belies the argument. While the inference regarding the recent possession of stolen property was raised, the Court nevertheless instructed the jury that the Commonwealth had the burden of proving its case beyond a reasonable doubt.

Next, West alleges his attorney was ineffective for failing to object to certain areas of questioning and evidence that would have been objected to had counsel investigated the facts given him by the defendant concerning Ronnie Elkins. Again, the uncontradicted affidavit of counsel, together with petitioner's traverse, establish that petitioner did not tell his attorney anything about Mr. Elkins prior to the time petitioner took the witness stand. In any event, petitioner has not demonstrated that he suffered any prejudice from his attorney's alleged failures. Accordingly, Claims 8(a) and 8(b) will be DISMISSED.

(Continued from previous page)

prior to trial, and even conceding that his attorney may not have specifically described those items, he was certainly aware that the items included a mirror, a TV set, a coffee table, and a bar. He certainly knew that he had recently purchased those from Mr. Elkins. An attorney cannot be faulted for knowledge concealed by his client.

Finally, petitioner alleges that he is entitled to habeas relief because of newly discovered evidence: the affidavit of Ronnie Elkins supporting petitioner's trial testimony. In order to obtain habeas relief on the basis of newly discovered evidence:

[the] evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas.

Townsend v. Sain, 372 U.S. 293, 317 (1963); see also *Stockton v. Virginia*, 852 F.2d 740, 749 (4th Cir. 1988), cert. denied, 109 S. Ct. 1354 (1989); 28 U.S.C. § 2254(d). The affidavit of Ronnie Elkins goes only to the credibility of West's testimony. It does not go to the constitutionality of his confinement. Hence, Claim 9 must be DISMISSED.

For the foregoing reasons, respondents' motion for summary judgment will be GRANTED, and the petition will be DISMISSED.

Should the petitioner wish to appeal, written notice of appeal must be filed with the Clerk of the Court within thirty (30) days from the date of entry hereof.

An appropriate Order shall issue.

/ S / JAMES R. SPENCER

U.S. DISTRICT JUDGE

Dated: JUN 1 1989

App. 34

CORRECTED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 8, 1991

No. 89-6686

FRANK ROBERT WEST, JR.
Petitioner - Appellant

v.

ELLIS B. WRIGHT, JR., Warden;
MARY SUE TERRY, Attorney General of Virginia
Respondents - Appellees

On Petition for Rehearing
with Suggestion for Rehearing In Banc

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to the Court. In a requested poll of the Court, Judges Russell, Widener, Hall, Wilkins and Niemeyer voted to rehear the case in banc; and Judges Ervin, Phillips, Murnaghan, Sprouse and Wilkinson voted against rehearing in banc. As a majority of the judges did not vote to grant rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

App. 35

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc is denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Ervin and Judge Murnaghan.

FOR THE COURT,
/s/ John M. Greacen
Clerk

App. 36

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 9, 1991

No. 89-6686

FRANK ROBERT WEST, JR.

Petitioner - Appellant

v.

ELLIS B. WRIGHT, JR., Warden;
MARY SUE TERRY, Attorney General of Virginia

Respondents - Appellees

ORDER

Upon motion of the appellees, and for cause shown,

IT IS ORDERED that the mandate in this case be, and it is hereby, stayed pending timely application to the United States Supreme Court for a writ of certiorari.

Entered at the direction of Judge Phillips with the concurrence of Judge Ervin and Judge Murnaghan.

FOR THE COURT,

JOHN M. GREACEN

Clerk

No. 91-542

Supreme Court, U.S.
FILED
NOV 19 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

ELLIS B. WRIGHT, JR., WARDEN, et al.,
Petitioners,

v.

FRANK ROBERT WEST, Jr.,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER MR. WEST'S UNEXPLAINED POSSESSION OF A PORTION OF THE HOUSEHOLD GOODS STOLEN FROM A CABIN IN ANOTHER COUNTY OF VIRGINIA SOME TWO TO FOUR WEEKS EARLIER IS CONSTITUTIONALLY SUFFICIENT EVIDENCE UNDER JACKSON v. VIRGINIA TO CONVINCE ANY RATIONAL JUROR BEYOND A REASONABLE DOUBT THAT MR. WEST, HIMSELF, COMMITTED THE LARCENY?

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STATEMENT OF THE CASE

Respondent, Frank West, pleaded not guilty to the charge of feloniously taking, stealing, and carrying away the property of Angelo F. Cardova with a value of \$100.00 or more in violation of Va. Code Ann. § 18.2-95 (Repl. Vol. 1975). J.A. 120a.¹ The testimony presented at trial indicated that Cardova, a resident of Falls Church, Virginia, owned a house in the Cabin Point subdivision of Westmoreland County, Virginia. J.A. 133a. On the afternoon of December 13, 1978, Cardova locked and left the cabin. He did not return until December 26, 1978. J.A. 134a. When Cardova entered the cabin on that date, he discovered that some of his property was missing and he notified the sheriff's office. Id. The value of the property taken from the Cardova cabin was \$3,500.00. J.A. 135a.

On or about January 22, 1979, Cardova was asked by Sheriff C. W. Jackson of Westmoreland County to view various articles that the police had recovered. Id. He identified the following items as having been taken from his cabin: two television sets; a bar; some groceries; a sleeping bag; a mirror from the Philippines; a coffee table; a hardwood carving in the shape of a

¹ The relevant portion of the Virginia larceny statute provides as follows:

Any person who ... [c]ommits simple larceny not from the person of another of goods and chattel of the value of \$200 or more, shall be deemed guilty of grand larceny....

Va. Code Ann. § 18.2-95(2) (Repl. Vol. 1988). At the time of West's conviction, the statutory goods and chattel value threshold was \$100.00.

ball and other wood carvings; a pair of shoes; a fur coat, valued at \$35.00, with the name "Esther" embroidered in the lining; a box containing flatware; a lobster that had been caught in the China Sea and mounted on a basket; a silk jacket decorated with the legend "Korea 1970"; and a record player. J.A. 135a-141a. The value of the items recovered was \$1,100.00. J.A. 142a. Several of the items that Cardova identified as his property were seized by the police on January 10, 1979, from West's residence in Gloucester County, Virginia. J.A. 145a-~~148g~~. West had previously shared this house with his wife, Carol Nadine West. At the time of the search, Mrs. West also had a residence in Richmond, Virginia, and spent only a portion of her time in the Gloucester County house. J.A. 158a-159a. West was not present at the time of the search. J.A. 149a.

Testimony from West's sister, Alice Shiflett, the owner of the house in which West resided, and from Peggy Jones, West's neighbor, established that West had exclusive possession of the house when the Cardova goods were recovered. J.A. 156a-165a. The only other testimony presented before the Commonwealth rested its case established the chain of custody for the Cardova property after it was seized by the police. J.A. 145a-156a.

At the close of the Commonwealth's case, West unsuccessfully moved to "strike the evidence" for failure to prove that he was the "active agent" in the theft. J.A. 166a. He then testified that he had purchased some of the items found by the police in his house from several different vendors at various

flea markets. J.A. 169a-170a. West indicated that he bought merchandise at flea markets and then resold the items at different locations. J.A. 170a. He specifically recalled purchasing several of the articles in question, including, but not limited to, the shell mirror and the mounted lobster, from Ronnie Elkins, who sold goods at flea markets. J.A. 171a-175a. West remembered that sometime before January 1, 1979, he gave \$500.00 to Elkins for all the items he purchased. J.A. 173a, 175a. West explained that he was not able to produce Elkins as a witness because he did not know until the day of the trial what items he was charged with taking. J.A. 178a-179a.

The Commonwealth presented no rebuttal evidence. West then renewed the motion to strike, which was denied. J.A. 180a. In closing argument, the defense's theory of the case was that the Commonwealth presented "no direct evidence whatsoever that [West] carried, himself, items out of the [Cardova] house." J.A. 195a. The Commonwealth, in its closing argument, relied on the common law inference that the possessor of stolen property is the thief and asked the jury to reject West's claim that he was an innocent possessor of the property. J.A. 183a-191a. In pertinent part, the judge instructed the jury as follows:

If you believe from the evidence beyond a reasonable doubt that property of a value of \$100.00 or more was stolen from Angelo F. Cardova, and that it was recently thereafter found in the exclusive and personal possession of the defendant, and that such possession has been unexplained or falsely denied by the defendant, then such possession is sufficient to raise an inference that the defendant was the thief; and if such inference, taking into consideration the whole evidence, leads you to believe beyond a reasonable

doubt that the defendant committed the theft, then you shall find the defendant guilty.

J.A. 215a.

The jury found the defendant guilty and sentenced him to ten years imprisonment. J.A. 202a-203a.

The sufficiency of the evidence to convict West beyond a reasonable doubt was unsuccessfully raised in the Virginia courts. See Pet. App. 5. West then unsuccessfully raised the sufficiency claim in a petition filed in district court pursuant to 28 U.S.C. § 2254.

On appeal, the Fourth Circuit reversed. The court first rejected threshold claims that the sufficiency issue was not exhausted in state court and that relief was, in any event, barred under the "new rule" restriction of Teague v. Lane, 489 U.S. 288 (1989). Regarding Teague, the court below rejected the Commonwealth's claim that West was asking for a "new rule" that Virginia's permissive inference was facially unconstitutional. Pet. App. 10. The court recognized that the basis for West's sufficiency claim was "simply that allowing the inference to be drawn by the jury on the facts of this case violated the proof-beyond-a-reasonable-doubt test of Jackson v. Virginia." Id. Teague was therefore inapplicable because "[o]bviously, a federal habeas court cannot be said to apply a 'new constitutional rule' whenever it applies the Jackson v. Virginia test to a 'new' set of facts in evidence." Id.

Regarding exhaustion, the court again noted that West was only raising a sufficiency issue on appeal, not a facial attack

on the inference. That sufficiency issue was exhausted because West had raised it at several different stages of the state court proceedings, both at trial, on appeal, and in state habeas proceedings. Pet. App. 8.²

The court then reached the merits and held that the evidence was not sufficient to convict for purposes of Jackson v. Virginia, 443 U.S. 307 (1979). The mere fact that West possessed some of the goods taken in the earlier burglary and the possession was "unexplained" could not persuade any rational juror that West was guilty beyond a reasonable doubt of committing the theft. Pet. App. 20.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner's attempts to cast the case in a "cert. worthy" light notwithstanding, there is nothing in the decision below which requires this Court's attention. There is no modification of Jackson v. Virginia, no "evisceration," as Petitioner

² The Commonwealth conceded in district court pleadings that the Jackson claim was exhausted:

Although the petitioner's claim concerning sufficiency of the evidence is cognizable and may be considered on the merits by this Court, he is not entitled to federal habeas corpus relief unless this Court finds that upon the record and evidence adduced at trial, 'no rational trier of fact could have found proof of guilt beyond a reasonable doubt.' See Jackson v. Virginia, 443 U.S. 307, 324 (1979).

J.A. 29a-30a. The Commonwealth urged the court to dismiss on this claim because "West was in possession of the recently stolen goods, and under Virginia law was guilty of larceny" and "[a] rational finder of fact could have found that West stole the property belonging to the Cardovas." J.A. 30a-31a.

contends, of Virginia's common law inference of theft, nor any announcement of a new rule of law in violation of Teague v. Lane. The court below did what it was constitutionally compelled to do under rulings of this Court already pronounced at the time the case was litigated in Virginia. Its determination that the evidence was insufficient to support West's conviction of theft breaks no new ground and raises no legal issue of national, or even local, concern.

1. The decision reached below comports with this Court's standards for analyzing the sufficiency of the evidence in cases where a state relies upon a permissive inference to prove guilt beyond a reasonable doubt.

The court below correctly applied the test enunciated in Jackson v. Virginia for review of sufficiency-of-the-evidence claims raised in 28 U.S.C. § 2254 proceedings. After assessing the evidence "in its entirety and in the light most favorable to the prosecution," the court concluded that no rational juror could find that West broke into the Cardova cabin and stole three thousand dollars' worth of household items simply because he was found to possess, without explanation, some of the stolen goods several weeks later.³ Pet. App. 20.

³ To understand the narrowness of the ruling below, it is important to distinguish between two very different inferences arising from the unexplained possession of recently stolen property: the inference that the possessor actually stole the property in question and the inference that the possessor received the property with knowledge that it was stolen. Only the former is implicated here, since West was charged with actual theft of the Cardova property, not with the lesser offense of receiving stolen goods. The inference of theft from the basic fact of possession is a much weaker inference than that of guilty knowledge: the latter is "more widely accepted without qualification or corroborating evidence [than the inference of theft]"

This holding is fully consistent with the Court's decisions concerning the use and probative force of permissive inferences to prove guilt. In United States v. Gainey, 380 U.S. 63 (1965), the Court upheld against a due process challenge an instruction which authorized the jury to infer from defendant's unexplained presence at an illegal still that he was "carrying on the business of a distiller or rectifier without having given bond as required by law." The Court noted, however, the distinction between finding that the use of an inference is constitutionally permissible⁴ and finding that the evidence giving rise to the inference is necessarily sufficient to support a conviction in a particular case. Id. at 68. A conviction which is based on the bare facts giving rise to a properly drawn permissive inference remains subject to challenge on sufficiency grounds. Thus, notwithstanding the permissive inference, the trial judge is free to direct a verdict or to grant judgement n.o.v., and the court of appeals may review the trial judge's denials of such motions. Id.

In Ulster County Court v. Allen, 442 U.S. 140 (1979), a habeas corpus case, the Court again held that the use of a common law or statutory permissive inference generally comports with due

for the simple reason that "the inference of mere knowledge is a much more likely one." Cosby v. Jones, 682 F.2d 1373, 1381 (11th Cir. 1982).

⁴ The Court found that the statutory permissive inference met the rationality test of Tot v. United States, 319 U.S. 463 (1943), requiring a rational connection between the facts proved and the ultimate fact presumed. Gainey 380 U.S. at 66-68.

process if it satisfies the more-likely-than-not rationality test of Leary v. United States, 395 U.S. 6 (1969)--that is, if there is a rational connection between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is "more likely than not to flow from" the former. Ulster County Court, 442 U.S. at 165-67. The Court explained that the "more likely than not" test is appropriate for assessing the constitutionality of allowing the jury to draw the permissive inference because the inference is just "one not necessarily sufficient part of [the prosecution's] proof" and the "prosecution may rely on all of the evidence in the record to meet the reasonable-doubt standard." Id. at 166-7 (emphasis added). "As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in Leary." Id. at 167 (emphasis added). As in Gainey, the Court recognized the distinction between the standard for allowing the use of a permissive inference and the independent question of whether the evidence, including the inference, in a particular case establishes proof of guilt beyond a reasonable doubt:

The permissive presumption, as used in this case, satisfied the Leary test. And, as already noted, the New York Court of Appeals has concluded that the record as a whole was sufficient to establish guilt beyond a reasonable doubt.

Id.

Finally, in Jackson v. Virginia, 443 U.S. 307, decided just three weeks after Ulster, the Court held that sufficiency-of-the-

evidence challenges were cognizable as due process claims in habeas proceedings. When such a claim is raised, the habeas court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319. The petitioner in such cases "is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Id. at 324.⁵

Thus, the law in effect at the time this case was litigated--and as it stands today--is clear: (1) a permissive inference is not, in itself, conclusive proof of guilt but must

⁵ In addition to Gainey, Ulster, and Jackson, the Court has had occasion to pass on a number of implications flowing from the use of inferences in connection with a defendant's unexplained possession of recently stolen property. See Barnes v. United States, 412 U.S. 837, 845-46 (1973) (instruction allowing inference from defendant's unexplained possession of recently stolen Treasury checks that defendant knew the checks to be stolen comports with due process); McNamara v. Henkel, 226 U.S. 520, 524-25 (1913) (finding evidence that defendant was found trying to crank stolen car, with disarranged ignition wiring, within a few hours of, and 40 feet from the place of burglary tended to show defendant's guilty participation in the burglary during which the car was stolen); Dunlop v. United States, 165 U.S. 486, 502 (1897) (holding that an instruction which allowed the jury to presume that items delivered to a mail box by mailmen were in fact mailed was not inconsistent with the presumption of innocence and the court need not instruct on the relative weight of the two presumptions; in dictum, noting the inference of theft from the possession of stolen goods as one of many examples where a presumption is not inconsistent with, or overridden by, the presumption of innocence); Wilson v. United States, 162 U.S. 613, 620-21 (1896) (defendant's possession of murder victim's property two weeks after murder was committed supported inference that defendant committed murder and jury could consider inference along with other evidence presented to determine guilt).

be considered along with all other evidence in determining whether there is proof of guilt beyond a reasonable doubt; and (2) a federal court, in evaluating a sufficiency claim on collateral review, has a duty to conduct an independent review of the evidence to determine whether any rational juror could have found proof of each element of the crime beyond a reasonable doubt.

Equally clear is the lower court's compliance with these rules. The court found as follows: that the "Commonwealth ... relied exclusively on Virginia's common law permissive inference that one in the unexplained possession of recently stolen goods is himself the thief" (Pet. App. 4); "the only evidence of guilt consist[ed] of the 'basic facts' of the inference" (Id. at 7); "[t]here was nothing ... that added any further probative force to those bare facts" (Id. at 14); an independent review of the evidence revealed that the "inferential force of the ... evidence used to invoke the inference" (Id. at 15) in this case was weak⁶ where "th[e] theft was not so recent that a purchase in the interval could not have been likely" (Id. at 16), "the items found in West's possession made up only a third in value of those stolen from Cardova" (Id.), the items were not concealed (Id. at 17), "[West's] proffered explanation [was not so totally incredible as to] be treated as positive evidence of guilt" (Id.

⁶ The analytical framework used by the court below in assessing the inferential force of the evidence was one that was also used in Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982), the first and among the very few federal circuit decisions having need to apply Jackson v. Virginia in a case where the common law inference of theft served as the only evidence of guilt.

at 19), and there was no evidence "that tended to 'corroborate' the inference" (Id. at 20); and finally, as a result of the foregoing, the evidence in this case, "assessed in its entirety and in the light most favorable to the prosecution, was not sufficient to persuade any rational trier of fact of [West's] guilt [of theft]." (Id.). Thus, the court found it irrational to conclude beyond a reasonable doubt that West participated in the burglary and theft of household items from the Cardova cabin simply because he was found to possess some of the items taken in the theft several weeks later in a different county of Virginia.

Petitioner protests, however, that the result in this case must be incorrect since "West's sufficiency claim was rejected by the state trial judge, all seven members of the Virginia Supreme Court, and a federal district court." Pet. 10. While these rulings certainly gave the panel pause, Pet. App. 20, they have no special significance as a matter of law. This Court does not permit a federal habeas court to defer to a state court's ultimate findings that the evidence is constitutionally sufficient; instead, the federal habeas court must make an independent evaluation of the sufficiency of the evidence. Jackson, 443 U.S. at 323-24.⁷

⁷ The brief amicus curiae of the Criminal Justice Legal Foundation in support of the petition for writ of certiorari seems implicitly to concede that the court below properly applied the standard of Jackson v. Virginia in this case. Brief Amicus Curiae at 3-4, 12. This amicus, however, urges the Court to grant certiorari in order to alter Jackson and require deferential review of sufficiency findings by state courts. Id. at 12. Because the Petitioner has not advanced this argument, and the courts below never addressed it, such a request is

2. The decision below did not disturb the jury's findings regarding West's testimony.

Petitioner claims that the decision below requires this Court's review because the lower court allegedly went beyond the Jackson analysis and impermissibly overturned the jury's conclusions concerning West's testimony, "substitut[ing] its own assessment of West's credibility for the jury's." Pet. 18. Petitioner's claim is premised on its belief that, where the common law inference of theft is involved, the "jury's resolution of the case necessarily will turn on whether the defendant explains his possession, or if an explanation is made, whether that explanation is credible." Id. In other words, the defendant's explanation is a "determinative factor." Id.

The problem with Petitioner's analysis is the failure to distinguish between the factual issue of whether a defendant's possession is satisfactorily explained and the sufficiency question of whether unexplained possession, alone or in combination with other evidence, proves guilt. A jury's determination that the defendant's possession of goods is unexplained is a credibility determination to which the habeas court must defer as part of its obligation to view the evidence in the prosecution's favor. Pet. App. 13 (quoting Jackson, 443 U.S. at 319). The court below did, in fact, defer to that credibility determination, as evidenced by its treatment of the

inappropriate here. See United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60 n.2 (1981); Bell v. Wolfish, 441 U.S. 520, 532 n.13 (1979); Knetsch v. United States, 364 U.S. 361, 370 (1960).

case as one involving unexplained possession of recently stolen property, to which the common law inference applies. To the extent the court analyzed West's explanation at all, it simply inquired--out of respect for the Commonwealth's right to have the evidence viewed in its favor--as to whether there was any incriminating evidence to be found in West's testimony.⁸ It concluded that West's explanation was not so incredible or inherently implausible as to amount, in itself, to evidence of guilt. Pet. App. 19.

What the court below did overturn was the jury's conclusion that West's unexplained possession of the goods proved his guilt of theft beyond a reasonable doubt. That conclusion, of course, was not a credibility determination to which the court was obliged to defer; rather, it was a sufficiency determination which is subject to review under the constitutional standard of Jackson v. Virginia.

3. The decision below is a fact-bound determination which has no broader implications that require plenary consideration by this Court.

Petitioner's effort to imbue the decision below with broad implications of national import is predicated on the contention that the common law inference presuming one in the unexplained

⁸ As the court recognized, if a defendant's testimony is wholly incredible on its face, it may serve as positive evidence of guilt. Pet. App. 19 n.8 (noting distinction between present case and United States v. Eley, 723 F.2d 1522, 1525 (11th Cir. 1984), a case in which a defendant's incredible story of a phantom man giving him \$50.00 to haul an eighteen-wheel trailer loaded with electric ranges to another city was found to be so facially implausible as to constitute positive evidence of guilt).

possession of recently stolen goods to be the thief was somehow "eviscerated" by the fact-bound ruling below. This contention is simply wrong.

It may be true, as Petitioner asserts, that the permissive inference of theft from the unexplained possession of recently stolen property enjoys widespread acceptance outside Virginia--though the petition fails to document this point in any meaningful way.⁹ Such acceptance, however, even assuming it exists, is irrelevant to the due process issue presented when the facts giving rise to the inference serve as the only evidence of guilt. This narrow, case-specific issue was the only issue resolved below. Whether, with different evidence, the bare facts of the inference would suffice to uphold any other conviction remains an open question. Pet. App. 21 ("[W]e hold only that the specific evidence used to invoke the inference of guilt here failed to meet the beyond-a-reasonable-doubt test of Jackson v. Virginia." (footnote omitted)). Had West been found in possession of all the stolen items within one week of the theft, for instance, or had the items been of another sort, the result might well have been different.

⁹ As a substitute for "an exhaustive survey of the states," Petitioner cites an annotation entitled What Constitutes "Recently" Stolen Property Within Rule Inferring Guilt from Unexplained Possession of Such Property, 89 A.L.R.3d 1202 (1979), as authority for its contention that the inference still retains "widespread acceptance throughout the Nation." Pet. 14 n.4. Because the annotation intermingles two very different inferences arising from the possession of recently stolen property--the inference of actual theft and the inference of guilty knowledge--it is impossible to determine the degree to which its citations support Petitioner's assertion.

Thus, there is nothing in the decision below which "eviscerates" the inference or threatens to unsettle deep-rooted principles of law. The ruling below is a case-specific determination which would not warrant further review, even if it were incorrect. We note in passing, however, that the ruling below is not just correct but fully consistent with the great weight of authority across the country holding that the use of the inference from the unexplained possession of stolen goods, when standing alone, to prove guilt beyond a reasonable doubt is not only subject to review on a case-by-case basis but may also be questionable in all circumstances. See, e.g., Swift v. Lynn, 870 F.2d 1039, 1041 (5th Cir. 1989) ("[h]ad the state's case [of burglary] rested solely on the fact that the defendant possessed stolen property, the defendant's insufficiency of the evidence claim would be valid"); Cosby v. Jones, 682 F.2d 1373, 1381 (11th Cir. 1982) ("We have found no case in ... Supreme Court jurisprudence, or elsewhere, sustaining the sufficiency of the evidence to convict for actual commission of theft, burglary or robbery where the prosecution's case rested on the bare inference of guilt from possession."); United States v. Bamberger, 456 F.2d 1119, 1134 (3rd Cir. 1972) (dicta) ("the inference of guilt is justified only in the presence of factors which suggest the probability that the person could not have obtained possession in any way other than by theft"), cert. denied, 413 U.S. 919 (1973); United States v. Jones, 418 F.2d 818, 822-24 (8th Cir. 1969) (reversing armed robbery conviction based solely on the inference

of theft by reason of proof of defendant's recent possession of stolen goods, noting that "[m]ost modern authorities ... either hold[] ... or imply[] ... that the inference from recent possession of stolen property must in some way be corroborated by other circumstantial factors ... to sustain a finding of sufficiency of evidence"); Torres v. United States, 270 F.2d 252, 258-59 (9th Cir. 1959) ("mere possession of [recently stolen] goods is not enough," as a matter of law, to sustain conviction of unlawful possession; rather, "whether the possession plus additional circumstances is sufficient to show [guilt] is a matter which must be considered on a case to case basis" (emphasis added)), cert. denied, 362 U.S. 921 (1960); Barfield v. United States, 229 F.2d 936, 942 n.1 (5th Cir. 1956) (Brown, J., specially concurring) ("Many cases reason that possession of recently stolen property gives rise to a presumption that the possessor (1) knew it was stolen, and (2) was the thief. In my view the total circumstances must furnish a legitimate basis for such an inference, and where not plausible in the setting of a particular record, the rule of law cannot supply the needed proof." (citations omitted)); Berryman v. Moore, 619 F. Supp. 853, 859 (E.D. Va. 1985) ("It cannot be said then that petitioner's possession [of the stolen goods] more than a month after the theft, standing alone, could constitute proof beyond a reasonable doubt that he committed the break-in."), appeal dismissed, 792 F.2d 139 (4th Cir. 1986); State v. Heath, 492 P.2d 978, 979 (Utah 1972) ("The mere possession of stolen property

unexplained by the [possessor] is not in and of itself sufficient to justify a conviction of larceny.... In addition ... there must be proof of corroborating circumstances tending of themselves to show guilt.").

4. The decision below does not implicate Teague v. Lane because it was "compelled" by precedent and it imposes no "new" obligation on the Commonwealth of Virginia.

Petitioner claims that review is appropriate in this case because the decision below announced and retroactively applied a "new rule" on habeas review in violation of Teague v. Lane, 489 U.S. 288. This contention is premised on a misreading of the Court's retroactivity decisions and of the ruling below.

In Teague, the Court outlined the definition of a "new rule":

[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

Id. at 301 (citations omitted).

Petitioner urges that the purpose of Teague is to proscribe "second-guessing" of state court decisions by federal courts.

Pet. 10. However, Teague does not so crudely diminish the responsibility of the federal habeas court. It only prohibits the retroactive application of law on habeas review.

This Court has subsequently held that a habeas court may only grant relief if the state court's decision violated federal law already in place at the time the case was being litigated before the state courts. The habeas decision must be "compelled"

by precedent known to the state courts, Saffles v. Parks, 110 S. Ct. 1257, 1260-61 (1990), not merely within the "logical compass" or "controlled" by precedent. Butler v. McKeller, 110 S. Ct. 1212, 1217 (1990). The purpose served by requiring the standard to be "compelled" rather than "controlled" is to ensure that "gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." Sawyer v. Smith, 110 S. Ct. 2822, 2827 (1990). "The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Butler, 110 S. Ct. at 1217.¹⁰

Viewed in this context, the decision below did not announce a "new rule."¹¹ As discussed, precedent existing at the time

¹⁰ Petitioner, citing the language of Butler, contends that federal courts may not accept any claims raised by a habeas petitioner, if the outcome is "susceptible to debate among reasonable minds." Pet. 9-10. However, Butler insulates good-faith interpretations of precedents from review, not close decisions applying that precedent. A federal court is not constrained by retroactivity principles simply because ruling in favor of a habeas petitioner will overturn the earlier decisions reached by lower courts. Such a rule would foreclose the grant of habeas relief in virtually every case presented to the federal courts, unless the identical issue, based on identical facts, had been decided before the state decision became final. As the court below noted, "[o]bviously, a federal habeas court cannot be said to apply a 'new constitutional rule' whenever it applies the Jackson v. Virginia test to a 'new' set of facts in evidence." Pet. App. 10.

¹¹ Petitioner asserts that the lower court's reliance on Cosby v. Jones, 682 F.2d. 1373 (11th Cir. 1982), is a retroactive application of a "new rule." Pet. 10. This argument is premised on the assumption that Cosby itself announces a "new rule." Pet. 10, 17. However, Cosby, like the decision below, was compelled by Jackson and Ulster. Cosby, 682 F.2d. at 1383 ("[T]he Court's

this case was litigated had firmly established the need for sufficiency review by a habeas court both generally, Jackson, 443 U.S. 307, and more specifically, in cases where a statutory or common law inference is the only evidence of guilt, Ulster, 442 U.S. 140. See discussion ante pp. 7-10. Nor does the decision below impose a new obligation on the Commonwealth of Virginia. Because the court below carefully limited its holding to the facts of this case and did not address the validity of the inference per se, its holding does not restrict the use of Virginia's inference in future cases.¹² See discussion ante pp. 14-15.

Perhaps the best indication that the decision below did not announce a "new rule" in Virginia is a recent decision from the Virginia Court of Appeals, Morton v. Commonwealth, 408 S.E.2d 583 (1991). That court overturned a conviction because the evidence

Ulster case clarifies that if the reviewing court can only say that the ultimate fact is more likely than not, then the Jackson v. Virginia standard has not been met."). Cosby no more announces a "new rule" than does the decision below. The fact that the Fourth Circuit found the Eleventh Circuit's non-binding analysis persuasive neither adds nor detracts from the Teague analysis.

¹² Petitioner also asserts that the court below decided a claim not exhausted in the state court proceedings. Pet. 13. Like Petitioner's Teague claim, this contention "rests on the erroneous premise that it [West's constitutional claim] involved a constitutional challenge to the facial validity of the permissive inference." Pet. App. 8-9. There is no facial challenge to the inference raised in this case, and the claim that was considered by the court below had been properly exhausted. Respondent raised a sufficiency claim in state and district court proceedings, and even the Commonwealth acknowledged that the district court was required to conduct a Jackson review on the merits. J.A. 29a-30a.

which gave rise to a permissive inference of an intent to distribute drugs was not sufficient, standing alone, to prove guilt beyond a reasonable doubt. Tellingly, the court looked to Ulster and the decision below for the proposition that a permissive inference does not necessarily prove guilt beyond a reasonable doubt in a given case:

[E]ven if the inference is permissive, if the only evidence of guilt is that which gives rise to the inference, a rational relationship must exist, beyond a reasonable doubt, between the inference and the proved fact.

Id. at 585 (citing Ulster and West). It is apparent from this decision that the Virginia Court of Appeals does not share the Petitioner's concerns about the ruling below.

5. The Petition fails to identify any compelling reason for granting certiorari.

Supreme Court Rule 10(a) sets forth the situations in which the Court has traditionally found compelling grounds for granting certiorari to review a decision of a United States court of appeals:

When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Sup. Ct. R. 10(a) (1990). None of these situations is presented here.

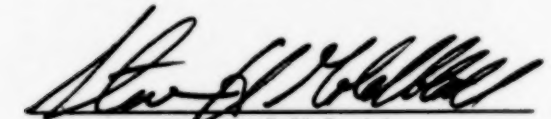
Petitioner has not identified any conflict between the decision below and the decision of any other United States court

of appeals on the same matter. Moreover, Virginia courts themselves appear to conduct the same type of review as that used below. See Morton v. Commonwealth, 408 S.E.2d 583, 585-86 (Va. Ct. App. 1991) (if only evidence of guilt is that giving rise to permissive inference, it must meet the "beyond a reasonable doubt" standard; holding, in case at bar, that rational juror could not have found defendant guilty beyond a reasonable doubt of intent to distribute cocaine based on nothing more than the bare facts giving rise to the permissive inference of intent). Nor does the fact that the Virginia Supreme Court reached a different result in this particular case represent a conflict which calls for the Court's intervention. This Court recognized in Jackson v. Virginia that juries will occasionally convict on the basis of constitutionally insufficient evidence, 443 U.S. at 317, and the federal habeas corpus statute, 28 U.S.C. § 2254, exists so that federal courts can redress such constitutional error when it goes unredressed in state courts. Id. at 323. A fact-bound dispute over the sufficiency of the evidence in a single case--notable only for its dearth of incriminating evidence--is simply not worthy of this Court's review. As Justice Stevens has noted: "[I]t would not be an appropriate use of this Court's scarce resources to grant certiorari and review every record in which a federal court makes a conscientious effort to apply the dictates of Jackson v. Virginia." Anderson v. Fuller, 455 U.S. 1028, 1030 (Stevens, J., respecting denial of certiorari).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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No. 91-542

Supreme Court, U.S.
FILED
NOV 22 1991
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

ELLIS B. WRIGHT, JR., WARDEN, et al.,
Petitioners,
v.

FRANK ROBERT WEST, JR.,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The
Fourth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

West asserts that the Court should deny certiorari because this case "raises no legal issue of national, or even local, concern." (Br. Op. 6). This contention is preposterous in view of the understandable and legitimate concern voiced by the twenty-five (25) States that have given Virginia their amicus support: "The Fourth Circuit's intrusion into matters of state law and policy is both unwarranted and unwise, and is of great concern to the States joined herein." (Florida Amicus Brief at 1).

The decision below simply cannot be reconciled with either *Teague v. Lane*, 489 U.S. 288 (1989), or *Jackson v. Virginia*, 443 U.S. 307 (1979). Both *Teague* and *Jackson* command federal court deference to the reasonable good faith judgments of state courts, and the Fourth Circuit's opinion is the antithesis of such deference. Indeed, West admits that the Court of Appeals premised its decision upon its own independent conclusion that his trial testimony attempting to explain his recent possession of stolen goods "was not so incredible or inherently implausible as to amount, in itself, to evidence of guilt." (Br. Op. 13). Surely, neither *Teague* nor *Jackson* permits a federal appeals court to so blatantly second-guess a jury determination that has been upheld by not just a state's highest court, but by a federal district court as well.

West's suggestion that the Criminal Justice Legal Foundation (CJLF) has conceded "implicitly" that the Fourth Circuit correctly applied *Jackson* is absurd. (Br. Op. 11 n.7). On behalf of CJLF, Mr. Scheidegger explicitly argues that "[i]f the state courts have fairly considered the claim and reached a conclusion within the bounds in

which reasonable judges can differ, that conclusion should not be disturbed." (CJLF Amicus Brief at 12). This concise statement of Virginia and CJLF's shared position is entirely consistent with both *Jackson* and *Teague*. West is simply wrong when he suggests that *Jackson* would have to be "altered" to "require deferential review of sufficiency findings by state courts" (Br. Op. 11 n.7); that is precisely what *Jackson* has *always* required. See 443 U.S. at 326.

Finally, the crux of this case "is whether the simple disagreement by a panel of the federal appellate court with the reasonable, considered judgment of the coequal state judiciary on a question within the latter's jurisdiction is sufficient ground for collateral attack on a final judgment." (CJLF Amicus Brief at 12). It would be difficult to imagine a question more fraught with implications for finality, comity and federalism, and this Court should grant certiorari so that henceforth all lower federal courts will understand that in the post-*Teague* era the question *must* be answered in the negative.

CONCLUSION

The petition for a writ of certiorari should be granted.

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(3)

No. 91-542

Supreme Court, U.S.
FILED
OCT 24 1991

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ELLIS B. WRIGHT, JR., Warden, et al.,
Petitioner,
-
vs.

FRANK ROBERT WEST, JR.,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit**

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF THE PETITION
FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

May a federal court grant collateral relief merely because it disagrees with the good faith, reasonable decision of the state courts on a "mixed question," i.e. the application of an established legal standard to the undisputed historical facts.

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**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF THE PETITION
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INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)¹ is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. Both parties have consented in writing to the filing of this brief.

The present case involves the extended relitigation of a claim already fully and fairly litigated in the state courts. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

In December 1978, Angelo Cardova was the victim of a burglary in which numerous items were taken. Pet. Cert. App. 2.² On January 10, during a consensual search of Frank West's home, police found a substantial portion of the stolen items. *Id.*, at 2-3. To connect West with the theft, the prosecution relied solely on Virginia's common law permissive inference that unexplained possession of recently stolen goods justifies a conclusion that the possessor is the thief. *Id.*, at 4.³

West challenged the sufficiency of the evidence by a motion at the end of the prosecution's case. *Id.*, at 5. He then testified and denied stealing the items. "His testimony was somewhat confused and he was unable to account for how he acquired some of the merchandise." *Id.*, at 3-4. His further challenges to the sufficiency of the evidence at trial, on appeal, and on state habeas corpus were rejected. *Id.*, at 5.

West then filed a habeas corpus petition in federal district court. Applying *Jackson v. Virginia*, 443 U. S. 307 (1979), the district court rejected his challenge to the sufficiency of the evidence. Pet. Cert. App. 27-28.

2. These facts are taken from the Court of Appeals' opinion.

3. This Court has expressly approved essentially the same inference in a federal criminal prosecution. "Possession of the fruits of the crime recently after its commission justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence." *Wilson v. United States*, 162 U. S. 613, 619 (1896).

A panel of the Court of Appeals for the Fourth Circuit reversed, holding that the evidence was not sufficient to convince any reasonable trier of fact. *Id.*, at 19-20. The court acknowledged it was disagreeing with the unanimous determination of a "properly instructed state jury of twelve, a state trial judge, the state's supreme court, and a federal district judge." *Id.*, at 20. The full Fourth Circuit split evenly over whether to grant rehearing en banc. Pet. Cert. 7.

SUMMARY OF ARGUMENT

A claim under *Jackson v. Virginia* is either a factual question or a "mixed question of law and fact." The rule that mixed questions are subject to *de novo* review on habeas corpus is based on premises which were flawed to begin with and which have eroded further over time. *Stone v. Powell*, *Miller v. Fenton*, and *Teague v. Lane* in combination require a reexamination of this rule.

De novo review of mixed questions should be reserved for truly fundamental claims, such as coerced confession, mob domination of trials, and denial of counsel. Other claims, including sufficiency of the evidence, should not be relitigated if the state courts have fairly reached a conclusion on which reasonable judges can differ.

ARGUMENT

I. The same standard of review does not necessarily apply to all "mixed questions."

A. Mixed Questions.

A strong argument can be made that sufficiency of the evidence is a factual determination and therefore deference is required under 28 U. S. C. § 2254(d). See *Jackson v. Virginia*, 443 U. S. 307, 336 (1979) (Stevens, J., concurring in the judgment). The *Jackson* majority seems to have rejected that argument, however, and announced a standard calling upon

the federal habeas court to make an independent evaluation of the sufficiency of the evidence. *Id.*, at 324. If the question is not a factual one, it must be a so-called "mixed question."

In 1953, Justice Frankfurter stated in a *concurring* opinion that federal courts had a duty to review questions of federal constitutional law *de novo* on federal habeas corpus. *Brown v. Allen*, 344 U. S. 443, 500-501 (1953). The majority opinion, when read carefully, tells us just the opposite. The rule of *Salinger v. Loisel*, 265 U. S. 224, 231 (1924), permitting discretionary deference to a prior adjudication by a federal court, applies equally to a prior adjudication by a state court. *Brown*, 344 U. S., at 463.

Despite its contradiction of the majority's holding, Justice Frankfurter's exposition has generally been followed as if it were the law. See, e.g., *Fay v. Noia*, 372 U. S. 391, 422 (1963), overruled on other grounds in *Coleman v. Thompson*, 115 L. Ed. 2d 640, 669, 111 S. Ct. 2546, 2565 (1991). Justice Frankfurter's thesis that the *de novo* review rule extends to "mixed questions," *Brown, supra*, 344 U. S., at 507, has also been followed. See, e.g., *Townsend v. Sain*, 372 U. S. 293, 318 (1963).

Defining "mixed questions," whether in habeas corpus or on direct appeal, has proven no easy task. This Court has described the problem as "elusive," *Miller v. Fenton*, 474 U. S. 104, 113 (1985), and "vexing," *Pullman-Standard v. Swint*, 456 U. S. 273, 288 (1982). "Mixed questions" are typically defined as those "which require the application of a legal standard to the historical fact determinations." *Sain, supra*, 372 U. S., at 309, n. 6. Yet it is elementary that this statement does not really set a clear standard for separating law from fact. Negligence is the most common example. Deciding whether defendant's specific conduct was "reasonable" falls squarely within *Sain's* definition of "mixed question," yet that determination has always been assigned to the jury as a question of "fact." Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 232, n. 22 (1985).

The jury bias cases illustrate that the standard of review on mixed questions has been confused. *Reynolds v. United States*, 98 U. S. 145 (1879) established a policy of great deference to the trial judge. "The question thus presented is one of mixed law and fact," *id.*, at 156, yet a reviewing court should not reverse "unless the error is manifest," *ibid.* In *Irvin v. Dowd*, 366 U. S. 717 (1961), a case involving intense publicity of the crime, the Court noted *Reynolds's* "manifest error" test, yet it held that on habeas corpus review of this mixed question, the federal court must exercise its independent judgment, relying on Justice Frankfurter's statement from *Brown v. Allen*. See *Irvin*, 366 U. S., at 723.

Patton v. Yount, 467 U. S. 1025 (1984), another pretrial publicity case, applied a presumption of correctness to the trial court's determination of the bias of individual jurors. *Yount* unconvincingly distinguishes *Irvin* as a case involving the bias of the jury as a whole. *Id.*, at 1036. *Wainwright v. Witt*, 469 U. S. 412, 429 (1985) followed *Yount* for the determination of bias on the basis of opposition to capital punishment.

The confusion and inconsistencies have not escaped scholarly criticism. Professor Monaghan notes two sources of confusion.

"First, courts assume that the properly affixed characterization [as 'law' or 'fact'] necessarily determines which legal actor is assigned the decisionmaking task. Second, the two categories have been used to describe at least *three* distinct functions: law declaration, fact identification, and law application." Monaghan, *supra*, 85 Colum. L. Rev., at 234.

The third category, law application, is not a "mixture" at all, but rather an entirely distinct function. *Id.*, at 237. Given specific historical facts and a broadly worded "test," do the facts meet the test? Attempts to assign this function to the category of "law" or "fact" are doomed to failure because they ask the wrong question. If a round peg must be pounded into one of two holes, one square and the other triangular, it will never fit.

Professor Monaghan asserted that the "real issue is not analytic, but allocative: what decisionmaker should decide the issue?" *Ibid.* In *Miller, supra*, this Court agreed. Casting aside the facade, the *Miller* Court frankly admitted that "the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." 474 U. S., at 114.

B. Allocation and Decision Makers.

Once the question is recognized as allocative rather than analytical, a problem with the labeling approach becomes apparent. Our complex adjudicative machinery has many different kinds of decisionmakers. There are administrative tribunals, juries, state trial judges, federal trial judges, state appellate courts, federal appellate courts, and the United States Supreme Court.⁴ Can the simple labeling of an issue as "law," "fact," or "mixed question" really properly allocate the decision among so many different actors? Amicus submits that it cannot.

Monaghan discusses in detail the distinction between "judicial control of the administrative state and appellate review of the decisions of inferior tribunals." Monaghan, *supra*, 85 Colum. L. Rev., at 247-263. The classification of issues for the purpose of allocating decisions between Article III courts and administrative bodies is based on different concerns from those which are involved in the allocation between trial and appellate courts in a unitary system. *Id.*, at 262-263.

Professor Monaghan does not discuss federal habeas corpus in detail as a separate category, but the decisions of this Court indicate that still different concerns are involved in the

4. This Court is *sui generis* because it is the only court with appellate jurisdiction over both state and federal courts. See 28 U. S. C. §§ 1254, 1257.

allocation of decisions between the state courts and the lower federal courts, as opposed to the allocation on direct review. *Stone v. Powell*, 428 U. S. 465 (1976) made clear that questions open for Supreme Court review on direct appeal from state courts are not necessarily open to collateral review on federal habeas corpus.

C. *Stone v. Powell*.

Mapp v. Ohio, 367 U. S. 643, 660 (1961) held that the admission in a state criminal trial of evidence seized in violation of the Fourth Amendment is a federal constitutional error. There is no other jurisdictional basis for imposing the rule on the states. The *Mapp* rule is either constitutional or it is wrong.⁵ The *Powell* Court refers to "a judicially created remedy rather than a personal constitutional right," 428 U. S., at 494, n. 37, but the remedy must be a constitutionally required one for a federal court to have jurisdiction to consider it. Compare *ibid.* (jurisdiction) with *Sawyer v. Smith*, 111 L. Ed. 2d 193, 209-210, 110 S. Ct. 2822, 2830 (1990) (habeas jurisdiction limited to federal questions).

Notwithstanding the constitutional nature of the rule, *Powell* held that full federal review was not a foregone conclusion. Particular categories of constitutional claims are open to individual examination. 428 U. S., at 478-479.

Fourth Amendment cases frequently involve so-called "mixed questions" or what Monaghan more accurately calls "law application." See *ante* p. 5. A comparison of Monaghan's definition of that category with this Court's description of the "probable cause" inquiry is instructive. "[L]aw application is situation specific; any ad hoc norm elaboration is, in

5. A strong argument has been made that the legislative branch could supplant the exclusionary rule with an alternate remedy. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 411 (Burger, C. J., dissenting). Our point here is that *Mapp*, if it is correct, is a constitutional rule at least in the absence of such an alternate remedy.

theory, like a ticket good for a specific trip only." Monaghan, *supra*, 85 Colum. L. Rev., at 236. "[P]robable cause is a fluid concept — turning on the assessment of probabilities in a particular factual context — not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U. S. 213, 232 (1983). "There are so many variables in the probable-cause equation that one determination will seldom be useful 'precedent' for another." *Id.*, at 238, n. 11. A *Gates* probable cause inquiry thus fits precisely its Monaghan's "law application" category. By forbidding relitigation on habeas corpus, see *Powell*, *supra*, 428 U. S., at 481-482, the *Powell* Court decided to allocate the exclusionary rule decision to the state courts as opposed to the federal habeas courts.

Supreme Court direct review of state Fourth Amendment law application, by contrast, is either *de novo* or a much milder form of deference. In *Minnesota v. Olson*, 109 L. Ed. 2d 85, 96, 110 S. Ct. 1684, 1690 (1990), this Court deferred to a state court's "fact-specific application of the proper legal standard." See also *id.*, at 96-97 (Kennedy, J., concurring). Yet two months later in *Alabama v. White*, 110 L. Ed. 2d 301, 310, 110 S. Ct. 2412, 2417 (1990), this Court reversed a state appellate court in a "close case." The difference appears to be that in *White* the Court believed that further elaboration of the norm was needed. Compare *id.*, at 307 with Monaghan, *supra*, 85 Colum. L. Rev., at 237, 273.

The bottom line, then, is that state courts generally are trusted with the application of Fourth Amendment law to specific factual situations. The Supreme Court on direct appeal has the discretion to review this law application *de novo*, but this discretion will generally only be exercised when it is necessary to clarify the law, and not merely for error correction. The federal habeas courts are limited to ensuring that the state courts provide the opportunity for full and fair litigation of the claim. As a matter of the sound administration of justice, to use *Miller's* words, it is better to leave these decisions to the state courts.

II. Recent developments have undermined the basis for *de novo* review of "mixed questions."

At least until *Miller v. Fenton*, 474 U. S. 104 (1985), determinations of whether a question of law application (other than the exclusionary rule) would be reviewed *de novo* on habeas corpus were made on the basis of the fact/law distinction. That is, if an issue was determined to be a "mixed question" then it was to be decided *de novo*, on the theory that such questions were the same, for this purpose, as questions of pure law. See, e.g., *Townsend v. Sain*, 372 U. S. 293, 313, n. 9, 318 (1963).

If questions of pure law are not reviewed *de novo*, however, then the logical foundation for *de novo* review of mixed questions is removed. It becomes a tail without a dog, a grin without a cat.

The rule of *Teague v. Lane*, 489 U. S. 288 (1989), as further expounded in *Butler v. McKellar*, 108 L. Ed. 2d 347, 110 S. Ct. 1212 (1990), has effectively changed the rule on "pure law" questions from one of *de novo* consideration to one of oversight to correct judicial disobedience. A rule is "new" under *Teague/Butler* if the outcome is "susceptible to debate among reasonable minds." *Butler*, 108 L. Ed. 2d, at 356, 110 S. Ct., at 1217. *Butler* "limits federal courts' habeas corpus function to reviewing state courts' legal analysis under the equivalent of a 'clearly erroneous' standard of review." *Id.*, 108 L. Ed. 2d, at 361, 110 S. Ct., at 1221 (Brennan, J., dissenting).

Indeed, Justice Brennan went so far as to conclude that the question presented in this case had already been decided in *Butler*.

"A federal court may no longer consider the merits of the petitioner's claim based on its best interpretation and application of the law prevailing at the time her conviction became final; rather, it must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable." *Ibid.* (emphasis added).

This statement is correct unless the rule being applied falls within one of the two *Teague* exceptions. The first is for categorical exemptions from punishment. See *Penry v. Lynaugh*, 492 U. S. 302, 330 (1989). This exception is clearly inapplicable to the present case. The second is for "watershed" rules. *Teague, supra*, 489 U. S., at 311.

The second exception has yet to find an actual application. See *Butler, supra*, 108 L. Ed. 2d, at 357, 110 S. Ct., at 1218; *Saffle v. Parks*, 108 L. Ed. 2d 415, 429, 110 S. Ct. 1257, 1264 (1990); *Sawyer v. Smith*, 111 L. Ed. 2d 193, 212-213, 110 S. Ct. 2822, 2832-2833 (1990). There may never be one. Criminal procedure jurisprudence is sufficiently developed that there may be no fundamental procedural rights remaining to "emerge." See *Teague, supra*, 489 U. S., at 313. Justice Harlan advanced this exception in 1971, when *Gideon v. Wainwright*, 372 U. S. 335 (1963) was only eight years old, apparently to explain his continuing concurrence in the retroactive application of *Gideon* on collateral review. See *Mackey v. United States*, 401 U. S. 667, 694 (1971).⁶

The existence of the second exception does mark a significant milestone in the development of habeas corpus theory, however. *Teague* converges with *Miller v. Fenton* and *Stone v. Powell* at this point in recognition that not all claims of constitutional error are equal. In 1953, when Justice Frankfurter penned his famous concurrence in *Brown v. Allen*, "fundamental" error and "constitutional" error were virtually synonymous, at least in cases involving state prisoners. See *Palko v. Connecticut*, 302 U. S. 319, 325 (1937), overruled in *Benton v. Maryland*, 395 U. S. 784, 796 (1969). Seventeen years later, a distinguished jurist referred to the body of constitutional decisions in this area as "a detailed Code of Criminal Procedure, to which a new chapter is added every year." Friendly, *Is Inno-*

6. Collateral attack via *Gideon* persisted for many years due to the widespread use of pre-*Gideon* priors for impeachment and sentencing. See *Burgett v. Texas*, 389 U. S. 109, 115 (1967).

cence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 155-156 (1970) (footnote omitted). Finally, in 1982 Justice Stevens said outright what many observers had known for some time. A great many constitutional claims are *not* fundamental. The assumption that all constitutional claims merit *de novo* collateral review needs to be reexamined. *Rose v. Lundy*, 455 U. S. 509, 543-544 (1982) (dissent).

Teague recognized through its second exception that truly fundamental claims require different treatment. *Miller v. Fenton* recognizes that the classification of "mixed questions" is often a policy decision rather than an analytical exercise. 474 U. S., at 113-115. *Stone v. Powell* recognizes that the exclusionary rule is too far removed from core constitutional rights to justify collateral review where state remedies are adequate. 428 U. S., at 494-495. In short, "claims of constitutional error are not fungible." *Lundy, supra*, 455 U. S., at 543 (dissent).

If *de novo* review of a mixed question on habeas corpus survives *Teague* and *Butler*, it must do so on some basis other than the discredited notion that all questions of "law" are reviewed *de novo*. That basis, amicus submits, can be found in the overlapping categories of *Teague*'s "watershed rules," the *Lundy* dissent's "fundamental" claims, and *Miller*'s "half century of unwavering precedent" rationale. See *Miller, supra*, 474 U. S., at 115.

The claims which require the extraordinary precaution of *de novo* collateral review are, by and large, the claims which historically led this Court to expand habeas corpus beyond jurisdictional issues into other constitutional questions. They include coerced confessions, *Leyra v. Denno*, 347 U. S. 556, 561-562 (1954); mob dominated trials, *Moore v. Dempsey*, 261 U. S. 86, 91 (1923); knowing use of perjured testimony, *Mooney v. Holohan*, 294 U. S. 103, 112 (1935); systematic exclusion of minorities from jury service, *Brown v. Allen*, 344 U. S. 443, 470 (1953); and complete denial of counsel, *Johnson v. Zerbst*, 304 U. S. 458, 467 (1938). See *Lundy, supra*, 455 U. S., at 544, nn. 9-11 (dissent); *Teague, supra*, 489 U. S., at 313-314.

It is no accident that all of these cases predate the criminal procedure revolution of the 1960's. With the exception of *Gideon*, all of the truly fundamental rules had been made directly under the Due Process Clause, without the need for the incorporation doctrine.

Applied to the present case, we find a federal rule which is both fundamental and long-standing that a defendant cannot, consistently with due process, be convicted on *no* evidence. *Thompson v. Louisville*, 362 U. S. 199, 206 (1960); see also *Crumpton v. United States*, 138 U. S. 361, 362-363 (1891). The standard of *Jackson v. Virginia*, 443 U. S. 307, 324 (1979) is of much more recent vintage. That is not to say that the rule is wrong or undesirable. States often have similar rules on direct appeal. See, e.g., 6 B. Witkin & N. Epstein, *California Criminal Law* §§ 3205, 3208 (2d ed. 1989). As the *Jackson* concurrence points out, however, there is no history of abuse demonstrating a pressing need for more intensive federal scrutiny. 443 U. S., at 329-330 (Stevens, J.). The state courts are competent to adjudicate challenges to the sufficiency of evidence.

In resolving the exhaustion issue in the present case, the Fourth Circuit held that the state courts had already decided the sufficiency of the evidence question adversely to West. See App. Pet. Cert. 8-9. The question presented is whether the simple disagreement by a panel of the federal appellate court with the reasonable, considered judgment of the coequal state judiciary on a question within the latter's jurisdiction is sufficient ground for collateral attack on a final judgment.

Absent any special reason for *de novo* federal review, amicus submits that disagreement is not sufficient reason. Amicus further submits that there is no special reason applicable to this case. If the state courts have fairly considered the claim and reached a conclusion within the bounds in which reasonable judges can differ, that conclusion should not be disturbed. Certiorari should be granted to clarify the standard of review for "mixed question" cases on federal habeas corpus in the post-*Teague* era.

III. *Estelle v. McGuire* may affect the disposition of the petition in this case.

On October 9, this Court heard oral argument in another case involving a federal court granting habeas relief on the basis of disagreement with a state evidentiary decision. *Estelle v. McGuire*, No. 90-1074. See also *McGuire v. Estelle*, 902 F. 2d 749 (CA9 1990); *McGuire v. Estelle*, 919 F. 2d 578 (CA9 1990) (Kozinski, J., dissenting from denial of rehearing en banc).

Depending on how *McGuire* is decided, that case may involve principles of habeas corpus law that have a significant impact on the present case. Therefore, amicus suggests that it may be prudent to defer the disposition of the present petition until *McGuire* is decided.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: October, 1991

Respectfully submitted,

KENT S. SCHEIDEGGER

*Attorney for Amicus Curiae
Criminal Justice Legal Foundation*

No. 91-542

FILED

JAN 30 1992

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1991

ELLIS B. WRIGHT, JR., WARDEN, et al.,

Petitioners,

v.

FRANK ROBERT WEST, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of
Appeals For The Fourth Circuit

JOINT APPENDIX

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**Petition For Certiorari Filed September 26, 1991
Certiorari Granted December 18, 1991**

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RELEVANT DOCKET ENTRIES

United States District Court for the Eastern District of Virginia (88-0412)

6/21/88 Petition for a Writ of Habeas Corpus
 8/4/88 Respondents' Motion to Dismiss
 8/4/88 Respondents' Brief in Support of Motion to Dismiss
 9/21/88 Petitioner's Traverse to Motion to Dismiss and Memorandum of Law in Support of Traverse with attachments
 6/1/89 Memorandum of Court
 6/1/89 ORDER that for the reasons set forth in the accompanying memorandum, respondents' motion for summary judgment is GRANTED; petitioner's petition is DISMISSED
 6/9/89 Petitioner's Notice of Appeal

United States Court of Appeals for the Fourth Circuit (89-6686)

6/20/89 Prisoner case docketed
 6/21/89 Record on appeal filed
 2/1/90 Clerk order filed appointing Steven H. Goldblatt as counsel for Appellant Frank Robert West
 4/20/90 Brief and joint appendix filed by Appellant
 6/7/90 Brief filed by Appellee
 6/22/90 Reply brief filed by Appellant Frank West
 7/18/90 Oral argument heard

8/2/90 COURT ORDER filed requesting supplemental memorandum from Appellant Frank Robert West on or before 08/17/90; Appellees file supplemental memorandum within 10 days after service of appellant's memorandum

8/17/90 Supplemental memorandum filed by Appellant Frank Robert West

8/28/90 Supplemental memorandum along with an attachment filed by Appellee

4/29/91 Published authored opinion filed

4/29/91 Judgment order filed

5/10/91 Petition filed by Appellee for rehearing

6/5/91 Response to motion for rehearing motion for suggestion of rehearing in banc filed by Appellant

7/2/91 COURT ORDER denying motion for rehearing, denying motion for suggestion for rehearing in banc

7/3/91 Motion filed by Appellee to amend order

7/3/91 Motion filed by Appellee to stay the mandate

7/8/91 Corrected order filed granting motion to amend order and denying petition for rehearing and suggestion for rehearing in banc

7/9/91 COURT ORDER filed granting motion to stay mandate

COMMONWEALTH OF VIRGINIA)
) TO-WIT:
 COUNTY OF WESTMORELAND)

In the Circuit Court of Westmoreland County, January Term, 1979.

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Westmoreland, now attending the Circuit Court of the said County, upon their oath, present that FRANK ROBERT WEST, JR., on or about the 13th day of December, in the year of one thousand nine hundred and seventy-eight, and in the said County, did feloniously (1) break and enter the dwelling house of Angelo F. Cordova, with the intent to commit larceny therein, in violation of Section 18.2-91 and (2) take, steal and carry away the property of Angelo F. Cordova having a value of \$100 or more, in violation of Section 18.2-95 of the Code of Virginia of 1950, as amended, against the peace and dignity of the Commonwealth of Virginia.

Upon the evidence of

C. W. Jackson

witness sworn in open Court and sent to the grand jury to give evidence.

VIRGINIA:

IN THE CIRCUIT COURT OF
WESTMORELAND COUNTY

COMMONWEALTH OF VIRGINIA :
vs. :
FRANK ROBERT WEST, JR. :

Complete transcript of the testimony and other incidents in the above, when heard on June 21, 1979, before Honorable Dixon L. Foster, Judge, and a jury.

APPEARANCES:

Robert B. Fox, Esquire,
Montross, Virginia,
Commonwealth's Attorney for the County of Westmoreland;

Michael C. Mayo, Esquire,
Colonial Beach, Virginia,
Counsel for the Defendant;

The Defendant, Frank Robert West, Jr., in person.

* * *

[p. 10] THE COURT: I ask the Clerk to arraign the defendant.

MR. FOX: If it please the Court, there were two counts in the indictment, and the Commonwealth only intends to proceed on one of those counts.

THE COURT: All right, sir.

THE CLERK: Are you Frank Robert West, Jr.?

THE DEFENDANT: Yes.

THE CLERK: Mr. West, you stand indicted for the following crime: Commonwealth of Virginia, County of Westmoreland, in the Circuit Court of Westmoreland County, January term, 1979. The grand [p. 11] jurors of the Commonwealth of Virginia, in and for the body of the County of Westmoreland, now attending the Circuit Court of the said County, upon their oath, present that Frank Robert West, Jr., on or about the 13th day of December, in the year of one thousand, nine hundred and seventy-eight and in the said County, did feloniously take, steal and carry away the property of Angelo F. Cardova, having a value of \$100.00 or more, in violation of Section 18.2-95 of the Code of Virginia of 1950, as amended, against the peace and dignity of the Commonwealth of Virginia.

How say you, guilty or not guilty?

THE DEFENDANT: Not guilty.

* * *

* * *

[p. 24] ANGELO F. CARDOVA, a witness called by the Commonwealth, having been duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MR. FOX:

Q Mr. Cardova, would you state your name, residence and occupation?

A My name is Angelo F. Cardova; I live at 3320 Franmore Drive, Falls Church, Virginia; I am a Government employee and an accountant by profession.

Q Mr. Cardova, do you own any real estate in Westmoreland County?

A Yes, sir.

Q Would you be kind enough to tell the jury where it is located?

A I own a house in a lot located at Cabin Point. It is on Section I, Lot Number 37.

Q Mr. Cardova, were you at your home in [p. 25] Westmoreland County on December 13, 1978?

A Yes, sir.

Q And when was the next time that you were at your home?

A December 26.

Q Would you be kind enough to tell the jury what, if anything, you discovered unusual at your home?

A I went to my house on the morning of December 26, and upon entering my house, I noticed some of my personal belongings were missing; the coffee table, the bar, the mirror, and several other items.

Q Did you subsequently determine that your house had been entered?

A Yes, I concluded that very instant that there had been a break-in, because all of the things were missing. I called the Sheriff's office to report it.

Q When you left your home on December 13, 1978, had you closed the house up?

A Yes, sir. I thought the house was secured before I left.

Q Had you authorized anyone to enter your home?

A No, sir.

Q Had you authorized anyone to remove any of your property?

[p. 26] A No, sir.

Q Mr. Cardova, did you make out or cause to be made out a list of the items that were stolen?

A Yes, sir.

Q Can you generally tell the jury the nature of the items that were stolen?

A I noted two television sets, a bar, some groceries. I prepared the list with my -

Q We will get to that in a second. Were you able to determine the value of the items that were missing?

A Yes, sir.

Q And what was that value, sir?

A The aggregate of all the items that were missing was \$3,500.00.

Q Did there come a time subsequent to December 27, 1978, when you had occasion to examine an inventory of the items in the presence of Sheriff Jackson? Did you come to Westmoreland County in an attempt to find any of the items that were taken?

A I met Sheriff Jackson around January. I am not sure about what date in January, maybe January 22, but I went to his office to identify the items that were recovered.

Q Were you able to identify any of the items that he had as yours?

A I would say I was able to identify [p. 27] definitely those items that I have proof. For example, I have a television set that I know the serial number of, the sleeping bag of my son has a name tag, the decorations in my living room which came from the Philippines, were specially made for me. I identified those

Q Under those circumstances, Mr. Cardova, I will show you some photographs, and ask you whether or not you are able to identify the items in the photographs.

THE COURT: Has counsel seen them?

MR. MAYO: I have seen them, Your Honor.

If Your Honor please, I would like to ask the Commonwealth if he is going to have these identified, I would like to have them marked as Exhibits at this time for identification.

MR. FOX: We will be happy to, but I certainly would like the Court's indulgence to present my own evidence.

THE COURT: It might be easier if you are going to identify something from the pictures to have them marked for identification. You may go ahead, and I will mark them.

BY MR. FOX: (Continuing)

Q I show you a picture and ask you whether or not you can identify the items in that picture.

A They are my personal property.

[p. 28] Q Can you tell the jury what those items are and what their value is, please.

MR. MAYO: I do not believe the items have been offered as evidence. I do not believe it is proper to show to the jury.

THE COURT: I think it is proper. You can continue, Mr. Fox.

BY MR. FOX: (Continuing)

Q Will you be kind enough to tell the jury what those items are and their value.

A This is a mirror. This was property brought by my daughter from Manila in October, and I had it brought to my house in October. It was one of those items that was missing, and it is worth \$30.00.

This pair of shoes fits me; that is my size.

These wood carvings are all from the Philippines.

Q Will you tell the jury their value?

A The value is \$60.00.

MR. FOX: I ask this to be marked for identification as Commonwealth Exhibit No. 1.

THE COURT: That will be marked as Commonwealth Exhibit No. 1.

BY MR. FOX: (Continuing)

Q Mr. Cardova, can you identify the item in [p. 29] this picture?

A This is an enlarged picture of the mirror and these are the wood carvings. The value of this is \$30.00, and this is \$60.00.

MR. FOX: Your Honor, please mark these as Commonwealth Exhibit No. 2.

THE COURT: That will be marked as Commonwealth Exhibit No. 2.

BY MR. FOX (Continuing)

Q Can you identify the item shown in that photograph?

A This is the coffee table that I bought from Levitz Furniture in Maryland in November, and this is a ball made of hard wood. It is a carving.

The coffee table is \$35.00, because I bought it during a sale, and that ball is around \$10.00.

MR. FOX: Please mark this as Commonwealth Exhibit No. 3.

THE COURT: Commonwealth Exhibit No. 3.

BY MR. FOX: (Continuing)

Q I show you two pictures at the same time, and ask you to identify that item for the jury.

A This is a mink coat that belongs to my wife, and that is a picture of the mink and the name of my wife is embroidered there, Esther.

[p. 30] MR. FOX: Your Honor, please mark the two pictures of the interior and exterior of the mink coat as Commonwealth Exhibit No. 4.

THE COURT: These together are Commonwealth Exhibit No. 4.

BY MR. FOX: (Continuing)

Q Mr. Cardova, are you able to identify that item? Excuse me - can you tell the jury the value of the coat?

A The value of the coat is \$35.00.

THE COURT: \$35.00?

THE WITNESS: Yes, sir.

A (Continuing) This is some flatware sitting in a box, and my wife bought this a year or two ago. We paid \$28.00 for this set.

MR. FOX: Please mark as Commonwealth Exhibit No. 5.

THE COURT: Commonwealth Exhibit No. 5.

BY MR. FOX: (Continuing)

Q Are you able to identify this item in this photograph?

A This picture is a lobster that was caught in the China Sea and mounted. It is mounted on a basket, and it

was hand carried to me in October by my daughter. The value of this is \$30.00

[p. 31] MR. FOX: Please mark as Commonwealth Exhibit No. 6.

THE COURT: Commonwealth Exhibit No. 6.

BY MR. FOX: (Continuing)

Q Can you identify the item shown in this photograph, Mr. Cardova?

A This picture is a silk jacket with the engraving saying "Korea 1970." My son-in-law was assigned to Korea, and he brought this to me as a gift. The value is around \$15.00.

MR. FOX: Commonwealth Exhibit No. 7.

THE COURT: This exhibit will be Commonwealth Exhibit No. 7.

BY MR. FOX: (Continuing)

Q Please identify this photograph, Mr. Cardova.

A This is the bar that I noticed right away was missing in my house when I walked in. My son-in-law brought this from Marlowe, Maryland, and this is the television set, a small television set, which I own. There is a record player beside it.

The value of the bar is around \$80.00, the T.V. is worth around \$65.00, and the record player, I would say, is around \$25.00.

MR. FOX: Please mark as Commonwealth [p. 32] Exhibit No. 8.

THE COURT: That will be Exhibit No. 8.

BY MR. FOX: (Continuing)

Q Mr. Cardova, here is one final picture.

A This is the television set, the Sony television set. I paid \$365.00 for this set, and I still have the receipt for this one.

Q Are there any special markings on this set to distinguish it from other sets of the same manufacturer?

A Well, the best evidence to prove that is the serial number, the serial number on the T.V. set. I have receipts to prove that it is mine.

MR. FOX: Commonwealth Exhibit No. 9.

THE COURT: That will be Commonwealth Exhibit No. 9.

MR. MAYO: May we approach the bench for a moment?

THE COURT: Yes, sir.

NOTE: At this point, the Court and counsel are conferring, out of the hearing of the jury, whereupon the hearing is resumed, viz:

THE COURT: You can continue, Mr. Fox.

BY MR. FOX: (Continuing)

Q Mr. Cardova, can you tell the jury the value of the items which have been recovered?

[p. 33] A The value of all of the items that I was able to recover was around \$1,100.00.

Q \$1,100.00?

A Yes.

MR. FOX: Would you be kind enough to answer Mr. Mayo's questions.

CROSS EXAMINATION

BY MR. MAYO:

Q Mr. Cardova, you are from Falls Church, Virginia?

A Yes, sir.

Q And you are an accountant, sir?

A Yes, sir.

Q When were you last in your cottage? It is a seasonal cottage at Cabin Point?

A It is our seasonal house.

Q Where do you work?

A In Washington, D.C.

Q Is the house in Cabin Point used for vacation purposes?

A Not exactly. We spend every weekend in that house.

Q Do you use that house on your days off?

A Yes, sir.

Q Do you consider yourself living in or [p. 34] residing at that place in Cabin Point?

A Yes.

Q And do you consider yourself also residing in Falls Church, Virginia?

A Yes, sir.

Q You were at your home on December 13, 1978, according to your testimony?

A Yes, sir.

Q When did you leave that day, sir?

A On December 13?

Q Yes, sir.

A I left my house around 5:30 in the afternoon.

Q And who was with you when you left?

A I was by myself.

Q By yourself?

A Yes, sir.

Q Are you married, sir?

A Yes.

Q Do you have a family?

A Yes, sir.

Q They were not with you on that day?

A No, sir.

Q I see. And at that time you say you secured the house?

[p. 35] A Yes, sir.

Q When did you next return?

A I returned on December 26.

Q And what time of day was that?

A Around 11:30 in the morning. My family was with me.

Q On that occasion?

A On that day.

Q Is Mrs. Cardova here today, sir?

A Yes, sir.

Q And your son is here today?

A No.

Q Mr. Cardova, do I understand you to say that the items that you found missing when you returned on December 26 had a total value of \$3,500.00?

A Yes, sir.

Q And it is my further understanding of your testimony that the items recovered were valued at \$1,100.00?

A Correct.

Q And some items were not accounted for; is that correct?

A Right.

MR. MAYO: I have no further questions, Your Honor.

THE COURT: You can step down, Mr. Cardova.

* * *

* * *

[p. 36] C. W. JACKSON, a witness called by the Commonwealth, having been duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MR. FOX:

Q Good morning, Sheriff Jackson. Will you be kind enough to identify yourself.

A Sheriff C. W. Jackson, Westmoreland County.

Q And you were the Sheriff on January 10 of 1979?

A Yes, sir, I was.

Q Did you have occasion on that date to go to Gloucester County to the home of Frank West?

A Yes, I did.

Q And for what purpose did you go there?

A I went to the home to make a search of the [p. 37] premises.

Q Would you be kind enough to tell the jury what happened when you arrived at the home?

A When we arrived at the home, I had to go through a gate there and the gate, as I recall, was locked.

There was a vehicle sitting inside the gate, and there was a fence surrounding the yard.

One of the officers that was with me observed movement of a curtain or something inside the house. Anyway, they came up and advised me that they observed movement in the house, and I told them to find out who was in the house at this time.

Several of the officers jumped over the fence and went to the door. Mrs. West, Nadine West, the wife of the defendant, answered the door, and invited them on in. I followed a few minutes later. She consented to a search of the premises at that time.

Q Did you undertake a search after receiving consent?

A Yes, sir, we did.

Q What, if anything, did you find there and what did you do with the items?

A We found numerous items that we could identify by reports of the items that were stolen in Westmoreland County. We rented a U-Haul van later on in the day, [p. 38] and we loaded the items up.

* * *

* * *

[p. 57] MR. MAYO: If Your Honor please, I would like to make a motion to strike the evidence that

has been presented. Number one, I have heard no evidence whatsoever to show that Frank West was the person who collected these items and carried them off. There have been no witnesses, no single bit of evidence presented as to him taking the stuff off the premises of Mr. Cardova.

The larceny has not been shown, because he has not been shown as the active agent that did this. All this amounts to this: The mere possession of some items identified by Mr. Cardova as having been taken from his premises, and allegedly to have been taken by Mr. West to Gloucester, Virginia.

* * *

[p. 59] THE COURT: We overrule the motion, Mr. Mayo.

MR. MAYO: Please note our exception in the record.

* * *

MR. MAYO: The defense wishes to call Frank Robert West, Jr.

THE COURT: All right, he can be sworn to take the stand.

NOTE: The witness was sworn.

FRANK ROBERT WEST, JR., the defendant, called in his own behalf, first being duly sworn, testifies as follows:

[p. 60] DIRECT EXAMINATION

BY MR. MAYO:

Q Mr. West, I am going to put certain questions to you; please direct them to the jury, if you will.

Would you please state your name?

A Frank Robert West, Jr.

Q And your age, Mr. West?

A I am 47 years old.

Q Mr. West, have you previously been convicted of a felony?

A Yes, sir, I have.

Q And you have heard in full the testimony here today against you?

A Yes, sir, I have.

Q I would like you to tell the jury in your own words, if you will, please, the circumstances of the case and your explanation.

A Right. Well, I am charged with this crime of stealing this stuff, and I have not stolen anything, and I have never been tried with a charge in this County. I have never done anything in this County to break the law.

In Gloucester, which is where I lived, I did have a lot of different items in my possession in that house, but it was several other people that had items in it, too; my sister had furniture and stuff in the house, and my wife still [p. 61] had personal items in that house.

Now, I bought a lot of the merchandise from the flea bargain places and sold a lot of them in several different locations. I go from time to time to these places, just like all of you do, and a lot of times you buy things from there that are stolen. The biggest part of the time you never know it. Some of these items may have been stolen that could be in the house, because I bought the items from several guys. I have sold several truckloads of items at different places, but I have not been in this County and stole anything or broken in in [sic] any house.

Q Do you know Angelo Cardova?

A No, sir, I don't.

Q Are you familiar or do you have any knowledge of where his premises are, other than what you have heard here today?

A I don't have the slightest idea, period, where this gentleman lived.

MR. MAYO: I have no further questions at this time, Your Honor.

CROSS EXAMINATION

BY MR. FOX:

Q Mr. West, I show you a photograph marked Commonwealth's Exhibit No. 1. I would like for you to tell the jury whose items those are and where they came from.

[p. 62] A I really do not know whose items they were.

Q Are those items that you bought at a flea market?

A Well, I didn't buy these items at a flea market, no sir.

Q Whose items are they?

A They are some items that I got from a Ronnie Elkins.

Q All of the items you bought from him?

A I can't say all.

Q Which ones did you buy from him?

A I can't say, because I don't have an inventory.

Q Can you tell me the ones you bought from Ronnie Elkins?

A Yes, I am sure I can.

Q Which ones?

A I would say the platter.

Q How about the sea shell mirror?

A Yes, sir, I think so.

Q Where did you buy that?

A In Newport News at a flea market.

Q And when did you buy it?

A I would guess before January 1.

Q How long have you known Mr. Elkins?

[p. 63] A For lots of years.

Q Do you know where he is today?

A As far as I know, he is in Newport News.

Q All right. I direct your attention to Commonwealth's Exhibit 2; that is the mirror you say you bought from Ronnie Elkins in Newport News in January?

A Yes, I believe that is the same one.

Q But the other items, you are not sure who you bought those from?

A No, sir. I did not have an inventory when the Sheriff came and hauled them all away from my home.

Q I show you Commonwealth's Exhibit 3, and it shows that coffee table. Would you tell the jury how you got the coffee table?

A Well, to the best of my knowledge, I had several coffee tables.

Q How about that coffee table?

A I can't specifically say I got this from him or not.

Q You do not know who you got this from?

A I could have gotten this from him.

Q Ronnie Elkins?

A Yes, sir.

Q On the same day that you got the other [p. 64] items?

A Yes, sir, all at one time for \$500.00.

Q Ronnie Elkins is someone you have known in Newport News?

A I don't know where he lives in Newport News, but he is in Newport News.

Q I show you a photograph of the fake fur with "Esther" on the inside. Where did you get that?

A From the same man. I gave him \$5.00 for this.

Q You remember that it had "Esther" in it?

A I don't know whether it had "Esther" in it or not.

Q Is it the same coat?

A I had several coats like that.

Q You had several coats with "Esther" in it? Did you buy this coat specifically from him?

A I am pretty sure I did, because I remember the flap.

Q But you don't remember "Esther"?

A No.

Q Are you sure it is the same coat?

A I am fairly sure, but not definite.

Q I show you Commonwealth's Exhibit 6. Is this the silverware - can you identify that?

[p. 65] A Not by that photograph, no, sir.

Q Do you know whether or not that is yours?

A I can't say, because I have several sets of silverware.

Q Do you know whether or not this was in your home?

A No, I don't.

Q You don't deny that you have lived in Gloucester County, in Perrins?

A It is very possible.

Q Do you deny that you live in Gloucester County in Perrins?

A No.

Q Do you deny that Mrs. Jones lives behind you?

A No.

Q Did you tell the jury the truth on the stand?

A She doesn't know; she's not in the home.

Q I show you the picture of a mounted lobster.

A Yes.

Q Where did you get that?

A From Ronnie Elkins.

Q At the time you got the other things?

A Yes, sir.

[p. 66] Q Before January 1?

A Before January 1.

Q How long before January 1?

A I really don't know. It was before January 1.

Q You remember Ronnie Elkins; you remember a \$500.00 purchase; and you remember a \$5.00 purchase for a fake fur coat.

Tell us when you got it?

A Around January 1.

Q Around January 1; before or after?

A I would guess around January 1.

Q Tell me about Ronnie Elkins and how you happened to do business and how you happened to go there, all about the transactions.

A I can't tell you how Ronnie Elkins does business.

Q I want to know about your business transactions with Ronnie Elkins.

A I buy and sell different items from different individuals at flea markets.

Q Tell us where that market is?

A In Richmond. You have them in Gloucester.

Q Where is Ronnie Elkins' flea market?

A He does not have one.

[p. 67] Q Didn't you say you bought some items from Ronnie Elkins?

A At a flea market.

Q Tell the jury where that is at.

A In Gloucester.

Q Tell the jury about this flea market and Ronnie Elkins, some time around January 1, and these items, not the other items.

A Ronnie Elkins does not own a flea market.

Q Tell the jury, if you will, where Ronnie Elkins was on the day that you bought the items?

A I don't remember. It was before January 1.

Q Where was it?

A I bought stuff from him in Richmond, Gloucester, and Newport News.

Q Where did you buy this?

A Over in Newport News.

Q Now, I show you a picture marked Commonwealth's Exhibit 12 - excuse me, Exhibit No. 8, and ask you to identify that bar.

A Yes, I bought that bar from him.

Q At the time you bought the other things?

A Yes, but it was not put together like that.

Q Did you put it together?

A No, sir. Apparently, the Sheriff here put [p. 68] it together.

Q How about this small television with the clock on it?

A I bought several televisions from different individuals at flea markets.

Q Did you buy this one from Ronnie Elkins?

A I can't state that I know.

Q Do you know where this came from?

A No, sir, I don't.

Q I show you Commonwealth's Exhibit No. 7, showing a jacket with "Korea" on it. Do you recall where you got this?

A Yes, from Ronnie Elkins.

Q At the same time you bought the others?

A Right, everything except the television set. No, I could have bought the television set.

Q Are you familiar with this television set, Commonwealth's Exhibit No. 9?

A It looks like a television I have in my home.

Q Do you have any explanation for the jury why it had Mr. Cardova's Social Security Number on it?

A I don't know anything about a Social Security Number, but I have one like that.

Q A Sony television set; that is yours?

[p. 69] A I don't know if that is mine or not. The officials in Westmoreland County have mine.

Q Is that yours?

A I cannot say that that's mine.

Q If it is not yours, why is it in your home?

A I own a Sony color television similar to that.

Q Tell us where you bought this Sony color television set similar to that?

A I bought it in Goochland County.

Q Who did you buy it from?

A I forget the guy's name, but I can prove it.

Q Okay. Please prove it to the jury.

A I can prove it by Walter Riddle, the superintendent of the Northside State Farm.

Q Walter Riddle? Where is he today?

A He is the warden there.

Q Where is he?

A In Goochland.

Q Did you subpoena him here today?

A I didn't know I would have to.

Q Did you subpoena him to be here today?

A No sir.

Q Did you subpoena Mr. Elkins to be here today?

[p. 70] A No, sir. This is the first time I have been confronted with what I was to be charged with.

Q You are represented by counsel, are you not, Mr. West?

A Yes.

Q You have not been informed of the allegations against you?

A I have never been confronted with the items.

MR. FOX: No other questions, Your Honor.

MR. MAYO: I have no questions, Your Honor.

THE COURT: You may step down, Mr. West.

* * *

[p. 71] MR. MAYO: If Your Honor please, I would like to make a motion, renew my motion once again to strike the evidence. It is contrary to the law and the evidence as presented by the Commonwealth. I renew it based on the ground that I have previously given.

THE COURT: We overrule the motion, Mr. Mayo.

MR. MAYO: Please note my exception.

* * *

DEFENSE COUNSEL'S JURY ARGUMENT:

* * *

[p. 86] Ladies and gentlemen of the jury, there has been no direct evidence at all that said Frank Robert West, Jr., was in the house of Mr. Angelo Cardova. There has been no evidence whatsoever that he went into the house or he came out of the house. There is no direct evidence whatsoever that Frank Robert West, Jr. carried, himself, items out of the house. Remember "asportation,"

the larceny word for carrying away the goods of another? That is what he is charged with. He is not charged with possession; he is charged with being the person who took those items [p. 87] out of that house and went away with them. There is no such evidence. The Commonwealth, because they do not have that evidence and because they found these goods in Frank Robert West's house, say he must have been the one that did it. Look, he's got the stuff. There is no evidence he took the stuff. I have heard no evidence at all, direct or otherwise, setting forth that there were fingerprints in the house, that there were fingerprints in the house nor on the items in the house. I have seen no evidence nor heard any that placed Frank Robert West, Jr. in the vicinity of the Cardovas' house; at, before, or after Mr. Cardova's items were taken. We are not denying the items were taken. Mr. Cardova certainly testified to that. There is no dispute here. I believe the items that were entered here are Mr. Cardova's items that were stolen, but that does not mean Frank Robert West, Jr. did it.

* * *

[p. 92] THE COURT:

* * *

The Court has prepared the verdicts for you. One is, we, the jury, find the defendant, Frank Robert West, Jr., guilty of larceny as charged in the indictment and fix his punishment at - or, we, the jury, find the defendant,

Frank Robert West, Jr., not guilty. Of course, there are just two possible verdicts.

* * *

INSTRUCTION NO. 1

The jury are the sole judges of the credibility of the witnesses; and in determining the weight given to the testimony of the witnesses the jury may consider the appearance and demeanor of the witness on the witness stand; their manner of testifying; their apparent intelligence or lack of it; their interest or lack of it in the outcome of the case; their temper, feeling or bias, if any has been shown; their opportunity for knowing the truth and having observed the things concerning which they testify; and from these and all other surrounding circumstances at the trial, the jury are to determine which witnesses are more worthy of credit and give credit accordingly.

INSTRUCTION NO. 2

It is not necessary that material facts be proven by direct evidence; they may be proven by circumstantial evidence, that is, the jury may draw all reasonable and legitimate inferences and deductions from the evidence adduced before them.

INSTRUCTION NO. 3

Circumstantial evidence is legal and competent, and a person charged with a crime may be convicted upon

circumstantial evidence alone, or upon circumstantial evidence connected with other evidence, if the jury believe beyond a reasonable doubt from such circumstantial evidence that the person so charged is guilty; therefore, the jury have the right to convict the defendant upon circumstantial evidence alone, or upon circumstantial evidence coupled with other evidence, if from all the evidence the jury believe that guilt of the defendant has been proven beyond a reasonable doubt.

INSTRUCTION NO. 4

The defendant is presumed to be innocent of the offense with which he is charged and this presumption of innocence goes with him through the entire case and applies at every stage thereof and is sufficient to require you to find the defendant not guilty unless and until the Commonwealth upon whom the burden rests, proves his guilt beyond a reasonable doubt, and the Court further tells you that it is not sufficient that facts and circumstances proved be consistent with the guilt of the defendant, but they must be inconsistent with every reasonable hypothesis consistent with the innocence of the defendant.

INSTRUCTION NO. 6

If you believe from the evidence beyond a reasonable doubt that the defendant took and carried away any of the property of Angelo F. Cordova, as charged in the indictment, and of a value of \$100.00 or more, against Angelo F. Cordova's will and without his consent, and with the felonious intent to permanently deprive him of

his ownership thereof, then you shall find the defendant guilty of grand larceny and fix his punishment at confinement in the penitentiary not less than one nor more than twenty years, or by confinement in jail not exceeding twelve months or by a fine not exceeding one thousand dollars, either or both.

INSTRUCTION NO. 7

If you believe from the evidence beyond a reasonable doubt that property of a value of \$100.00 or more was stolen from Angelo F. Cordova, and that it was recently thereafter found in the exclusive and personal possession of the defendant, and that such possession has been unexplained or falsely denied by the defendant, then such possession is sufficient to raise an inference that the defendant was the thief; and if such inference, taking into consideration the whole evidence, leads you to believe beyond a reasonable doubt that the defendant committed the theft, then you shall find the defendant guilty.

INSTRUCTION NO. 11

The burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged against the defendant. It is not sufficient that the jury may believe his guilt probable, or more probable than his innocence. Suspicion or probability of guilt, however strong, will not authorize a conviction, but the evidence must prove his guilt beyond a reasonable doubt. The jury shall not speculate or go outside of the evidence to consider what they think might have taken place, but you are to confine your

consideration to the evidence introduced by the Commonwealth and the defense and unless you believe, upon a consideration of all the evidence before you, that guilt of the defendant has been proved beyond a reasonable doubt as to every material and necessary element of the offense charged against him then you shall find the defendant not guilty.

INSTRUCTION NO. 12

Where the Commonwealth undertakes to prove the guilt of the defendant by circumstantial evidence, it must not only prove the circumstances relied upon, but it must overcome the presumption of innocence of the defendant and establish his guilt beyond a reasonable doubt. All necessary circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt, but they must exclude every reasonable hypothesis except that of guilt. The chain of circumstances must be unbroken and the evidence as a whole must be sufficient to satisfy the jury that guilt of the defendant has been proven to the exclusion of any other reasonable hypothesis.

INSTRUCTION NO. 13

When the Commonwealth relies upon circumstantial evidence in order to secure a conviction, it is the duty of the jury to scan such evidence with great care and caution; and unless the circumstances proven are of such a character and tendency as to produce in the mind of the jury a moral conviction of guilt of the defendant beyond a

reasonable doubt, then you must find the defendant not guilty.

* * *

[p. 93] THE CLERK: Members of the jury, have you agreed upon a verdict?

THE FOREMAN: Yes, we have.

THE CLERK: We, the jury, find the defendant Frank Robert West, Jr., guilty of grand larceny as charged in the indictment, and fix his punishment at ten years in prison; signed L. S. Cooke, Jr., Foreman.

* * *

[p. 95] MR. MAYO: Yes, Your Honor. We wish to present two motions to the Court. We wish to renew our motion to strike the evidence as being contrary to the verdict - to set aside the verdict as being contrary to the law and the evidence, and we move to set aside the verdict.

THE COURT: We will overrule that motion.

* * *

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

FRANK ROBERT WEST, JR.

Appellant

v.

THE COMMONWEALTH OF VIRGINIA

Appellee

PETITION FOR APPEAL

To the Honorable Chief Justice and Associate Justice of the Supreme Court of Virginia:

The Petitioner, Frank Robert West, Jr., respectfully represents that he is aggrieved by a final order entered June 21, 1979, by the Circuit Court of Westmoreland County, Virginia, wherein the Appellant was the Defendant and the Appellee was the Plaintiff.

* * *

STATEMENT OF MATERIAL PROCEEDINGS
IN TRIAL COURT

On June 21, 1979, the Defendant, Frank Robert West, Jr., was tried before a jury in the Circuit Court of Westmoreland County, Virginia, the Honorable Dixon L. Foster, presiding, and was found guilty of having taken,

stolen and carried away the property of Angelo F. Cordova having a value of \$100.00 or more, in violation of Section 18.1-95 of the Code of Virginia of 1950, as amended; and was subsequently sentenced to 10 years in the State Penitentiary.

ASSIGNMENTS OF ERROR

The Circuit Court of Westmoreland County erred in the following particulars:

* * *

4. The Court erred in denying Defendant's motion to strike the prosecution's evidence at the close of Defendant's case because the evidence presented at the trial of the Defendant was not sufficient at law to convict him of the offense alleged in the indictment.

5. The Court erred in refusing to set aside the jury verdict because the Commonwealth did not carry the burden of proving the guilt of the Defendant beyond a reasonable doubt.

STATEMENT OF THE QUESTIONS PRESENTED

* * *

C. Did the trial court err in denying Defendant's motions to strike the evidence (Assignment of Error #4)

D. Did the trial court err in refusing to set aside the jury verdict? (Assignment of Error #5)

* * *

C. The trial court erred in denying defendant's motion to strike the evidence following the presentation of defendant's case.

The law in Virginia is clear that the recent and exclusive possession of stolen property will warrant a conviction of larceny unless the defendant affords a reasonable account of his possessions.¹¹ In the instant case the defendant claimed as his own the property found in his home and identified as the stolen property by the complaining witness. As an explanation of his ownership the defendant explained that he had purchased most of the items from a man named Ronnie Elkins who buys and sells frequently at flea markets generally in Richmond and Norfolk area. The case of the Commonwealth offered no evidence, physical or scientific, tying the accused to any alleged break-in. The only circumstantial evidence offered to establish a case was the finding in Frank West's home of less than 1/3 of the items missing from Mr. Cordova's home and the defendant gave a reasonable explanation for his possession of those. Without the inference of guilt upon which the Commonwealth's entire case was based, but which was effectively rebutted by the defendant, there was not sufficient evidence to allow the jury to decide and the trial court erred in failing to grant defendant's motion to strike the evidence.

D. The trial court erred in refusing to set aside the jury verdict as being contrary to the law and the evidence.

The defendant is presumed to be innocent of the offense with which he is charged until such time as the

¹¹ *Stallard v. Commonwealth*, 130 Va. 769, 107 S.E. 722 (1921)

Commonwealth shall prove his guilt beyond a reasonable doubt.¹² In this case the evidence shows that after a two week period of absence, Mr. Cordova returned to his vacation home to find goods valued at \$3,000 missing from that home. There is not one shred of evidence which places the defendant anywhere near the scene of the alleged crime. The Commonwealth then proceeds to show that some three weeks later approximately $\frac{1}{3}$ of these goods are found in the home of Frank West. Assuming the Commonwealth satisfactorily showed that those goods were in the exclusive and personal possession of the defendant, an inference of guilt is created only if that possession remains unexplained or falsely denied.¹³ In this case the defendant did explain the possession of the goods in question so even the inference of guilt which the Commonwealth may have established was rebutted. Because there was no other evidence at all to connect the defendant to the crime, we suggest that a rebutted inference of guilt is not sufficient to meet the standard of proof required of the Commonwealth, that a reasonable doubt must certainly exist and that the trial court erred in not granting the motion to set aside the verdict as being contrary to the law and the evidence.

* * *

¹² *Moore v. Commonwealth*, 202 Va. 667 at 670, 119 S.E.2d 324 at 327 (1961)

¹³ *Font v. Commonwealth*, 199 Va. 184 at 193-194, 98 S.E.2d 817 at 824 (1957)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 30th day of May, 1980.

Frank Robert West, Jr.,	Appellant,
against Record No. 791541	
Circuit Court No. 185	
Commonwealth of Virginia,	Appellee.

From the Circuit Court of Westmoreland County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

The said circuit court shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

FRANK ROBERT WEST, JR., # 64608

Full name and prison number
(if any) of Petitioner

v.

Case No. _____
(To be supplied by the
Clerk of the Court) Clerk
Supreme Court of Virginia

WARDEN

RECEIVED

Name and Title of Respondent

MAY 19 1987

PETITION FOR WRIT OF HABEAS CORPUS

* * *

D. Present Petition

14. State the grounds which make your detention unlawful, including the facts on which you intend to rely:

The Circuit Court of Westmoreland County erred in the following particulars:

* * *

4. The court erred in denying Defendant's motion to strike the prosecutions evidence at the close of defendant's case because the evidence presented at the trial of the defendant was not sufficient at law to convict him of the offense alleged in the indictment.

5. The court erred in refusing to set aside the jury verdict because the Commonwealth did not carry the burden

of proving the guilt of the Defendant beyond a reasonable doubt.

* * *

STATE OF VIRGINIA,
County of Westmoreland, to-wit:

Michael C. Mayo, (hereafter Counsel), being duly sworn,
deposes and says:

1. That I am an Attorney at Law having been admitted to practice law in the State of Virginia on 21 September 1973; that I am a member of the Virginia State Bar, the Virginia Bar Association, and the American Bar Association; that I am and have been a member of the Criminal Law Section of the Virginia State Bar and that I am a member of the Virginia Trial Lawyers Association; that a substantial part of my practice has been criminal defense litigation.

2. That I was appointed by the Judge of the Circuit Court of Westmoreland County to represent Frank Robert West, Jr. on indictments of Breaking and Entering and Grand Larceny handed down against him in said County at the January 1979 term; that I spent in excess of 236 hours of time in representing Mr. West on said charges and that I traveled over 2,151 miles interviewing witnesses pertaining to this case.

3. That an investigation of this case led Counsel to file Pre-trial Motions to suppress evidence recovered in searches made by law enforcement officers; that said Pre-trial Motions were heard on 15 June 1979, and that several witnesses were subpoenaed to the hearing by Counsel at the request of Frank Robert West, Jr.; that on 15 June 1979, Defense Counsel requested of his client, Frank Robert West, Jr., as Counsel had in the past, if he desired any witnesses be summoned for his Westmoreland County trial date on 21 June 1979, and Mr. West said he

had no witnesses he wished summoned; that again on 18 June 1979, Counsel inquired of Mr. West in his presence if he had any witnesses he wished subpoenaed for his trial on 21 June 1979, and Mr. West reconfirmed what he said on 15 June 1979, that he had no witnesses he wanted called; that at a meeting with Mr. West on 18 June 1979 he indicated he would take the stand in his own defense but would not tell his Counsel what the details of his testimony would be; Counsel was directed to "put him on the stand and he (Mr. West) would do the rest".

4. That on 19 June 1979, Counsel talked with Frank Robert West, Jr., by phone, to advise that the Commonwealth would only proceed with one (1) breaking and entering count at trial on 21 June 1979, and that the count alleging grand larceny would be *nolle prosequi*; that at this time and for the first time Mr. West requested Counsel get an Order from the Court to have Mr. Landon Gentry (then an inmate and witness for Mr. West in a trial in Northumberland County, Virginia, scheduled for 20 June 1979) subpoenaed as a witness for Mr. West's trial in Westmoreland County, scheduled for 21 June 1979; Counsel did so; Landon Gentry's name had never been mentioned before as a potential witness for the Westmoreland County trial.

5. That a jury trial in Westmoreland County was conducted on 21 June 1979, at which Frank Robert West, Jr. testified on his own behalf and for the first time presented a defense which involved Ronnie Elkins. No other person testified on behalf of the defense.

6. That five (5) months after trial Counsel received a letter from Frank Robert West, Jr. dated 18 November

1979, wherein he states, "his family has located Ronnie Elkins for him and they are trying to get a statement from Elkins." Mr. West asked "what (Counsel) could do with the statement in his case" (see attached letter marked Exhibit 1); that Counsel responded by letter dated 4 December 1979, wherein Counsel told West Counsel would like to interview Mr. Elkins as soon as possible before Counsel could advise Mr. West of any future use of any statement he may make. (See attached letter marked Exhibit 2.)

7. That by letter dated 19 February 1987 Frank Robert West, Jr. requested my services in assisting him regarding an anticipated affidavit from Ronnie Elkins and that I replied to his request by letter dated 27 February, which letters are attached and marked Exhibits 3 and 4 respectively.

8. That the first time Counsel heard of Ronnie Elkins was when Mr. West testified at trial on 21 June 1979; that Counsel did not know of such person before the trial date, and, therefore, Counsel could not investigate what he did not know about.

Respectfully submitted,

/s/ Michael C. Mayo
Michael C. Mayo

SUBSCRIBED AND SWORN to before me in my jurisdiction aforesaid this 13 day of July, 1987, by Michael C. Mayo.

GIVEN under my hand and notarial seal.

My commission expires: 6-9-91.

/s/ Mary C Beach
Notary Public

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 13th day of May, 1988.

Frank Robert West, Jr., No. 64608,	Petitioner,
against Record No. 870616	
Warden of the Brunswick Correctional Center,	Respondent.

Upon a Petition for a Writ of Habeas Corpus

The Court has considered the petition of Frank Robert West, Jr. for a writ of habeas corpus ad subjiciendum and the motion to dismiss filed in answer to a rule to show cause entered herein on June 15, 1987 and the petitioner's traverse thereto. Applying the rule in *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), to petitioner's allegation 6; the rule in *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), to petitioner's allegations 1, 2, 3, 4 and 5; the rule in *Penn v. Smyth*, 188 Va. 367, 49 S.E.2d 600 (1948), to petitioner's allegation e and "grouns [sic] three a and b"; and finding no merit in the other complaint raised by petitioner, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. It is therefore ordered that the said petition be dismissed, the rule discharged and that the respondent recover of the

petitioner his costs by him expended about his defense herein.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ Debra A. R. Clem
Deputy Clerk

FORM FOR USE IN APPLICATIONS
FOR HABEAS CORPUS UNDER 28 U.S.C. SECTION 2254
(Filed June 21, 1988)

FRANK ROBERT WEST, JR.

Name

Virginia state identification number: 64608

Prison Number

BRUNSWICK CORRECTIONAL CENTER, ROUTE
ONE, BOX 207-C, LAWRENCEVILLE, VA 23868

Place of Confinement

United States District Court EASTERN District of VIR-
GINIA

Case No. 88-0412-R

(To be supplied by Clerk of U.S. District Court)

FRANK ROBERT WEST, JR., PETITIONER

(Full Name) (Include name under which you were con-
victed)

v.

ELLIS B. WRIGHT, JR., WARDEN OF THE
BRUNSWICK PRISON, RESPONDENT

(Name of Warden, Superintendent, Jailor, or authorized
person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF VIR-
GINIA, MARY SUE TERRY

* * *

IN DENYING DEFENDANT'S MOTION TO STRIKE THE
PROSECUTION'S EVIDENCE AT THE CLOSE OF THE

DEFENDANT'S CASE BECAUSE THE SAID EVIDENCE
WAS NOT SUFFICIENT AT LAW TO CONVICT THE
DEFENDANT OF THE OFFENSE ALLED [sic] IN THE
INDICTMENT: TRIAL COURT ERRED IN REFUSING TO
SET ASIDE THE JURY VERDICT BECAUSE THE COM-
MONWEALTH DID NOT CARRY THE BURDEN OF
PROVING THE GUILT OF THE DEFENDANT BEYOND
A REASONABLE DOUBT.

* * *

D. Ground four: THE CIRCUIT COURT OF WEST-
MORELAND COUNTY ERRED IN THE FOLLOW-
ING PARTICULARS:

Supporting FACTS (tell your story *briefly* without citing
cases or law): THE COURT ERRED IN DENYING
DEFENDANT'S MOTION TO STRIKE THE PROSECU-
TION EVIDENCE AT THE CLOSE OF DEFENDANT'S
CASE BECAUSE THE EVIDENCE PRESENTED AT
THE TRIAL OF THE DEFENDANT WAS NOT SUFFI-
CIENT AT LAW TO CONVICT HIM OF THE OFFENSE
ALLEGED IN THE INDICTMENT.

* * *

E. Ground Five: THE CIRCUIT COURT OF WEST-
MORELAND COUNTRY ERRED IN THE FOLLOW-
ING PARTICULARS:

SUPPORTING FACTS: THE COURT ERRED IN
REFUSING TO SET ASIDE THE JURY VERDICT
BECAUSE THE COMMONWEALTH DID NOT
CARRY THE BURDEN OF PROVING THE GUILT OF
THE DEFENDANT BEYOND A REASONABLE
DOUBT.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FRANK ROBERT WEST, JR.,

Petitioner,

v.

CIVIL ACTION
NO. 88-0412-R

ELLIS B. WRIGHT, JR.,
WARDEN, ET AL.,

Respondents.

(Filed Aug. 4, 1988)

BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now the respondents, by counsel, and submit the following brief in support of the motion to dismiss:

* * *

5. Grounds 1(d)-1(e) challenge the sufficiency of the evidence to support West's conviction. He alleges that the trial court erred by denying his motion to strike the prosecution's evidence, and his motion to set aside the verdict.

Although the petitioner's claim concerning sufficiency of the evidence is cognizable and may be considered on the merits by this Court, he is not entitled to federal habeas corpus relief unless this Court finds that upon the record and evidence adduced at trial, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." See *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). The Supreme Court has espoused the limited nature of this review.

[T]his inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt'. . . . Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the Commonwealth.

Jackson, 443 U.S. at 319 (citations omitted) (emphasis in original). A review of the evidence in this case, in the light most favorable to the Commonwealth, clearly reveals that a rational trier of fact could have found the petitioner guilty beyond a reasonable doubt of stealing and carrying away the property of another, valued over one hundred dollars. See *Jackson*, 443 U.S. 307.

The victim, Angelo Cardova testified that he owned a home in Westmoreland County. He left his Westmoreland residence on December 13, 1979 and returned on December 26, 1979. When Cardova returned he found that the house had been broken into and certain "personal belongings, . . . the office table, the bar, the mirror and several other items" were missing. (Tr. 24-25). The items stolen from the Cardova residence were valued at \$3,500. (Tr. 26). Cardova identified as his belongings \$1,100 worth of items recovered from West's residence. (Tr. 27-33, 56). The items had been recovered as the result of a search conducted on January 10, 1980. (Tr. 36, 56). West was in possession of the recently stolen goods, and under Virginia law was guilty of larceny. See *Montgomery v. Commonwealth*, 221 Va. 188, 269 S.E.2d 352 (1980); *Fount v. Commonwealth*, 199 Va. 184, 190, 98 S.E.2d 817, 821-822 (1957); see also *Best v. Commonwealth*, 222 Va. 387, 282

S.E.2d 16 (1981); *Drinkard v. Commonwealth*, 163 Va. 1074, 1083, 178 S.E.2d 25, 28 (1935).

The evidence adduced at trial survives the requisite standard of review by this Court concerning the specific challenges by the petitioner. A rational finder of fact could have found that West stole the property belonging to the Cardovas. Therefore, the petitioner's claim of insufficient evidence to support his convictions is without merit and should be dismissed.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FRANK ROBERT WEST, JR.,

Petitioner

against

ELLIS B. WRIGHT, JR.,

WARDEN, OF THE

BRUNSWICK CORRECTIONAL
CENTER,

CIVIL ACTION
NO. 88-0412-R

(Filed Sep. 21, 1988)

Respondents.

TRAVERSE TO MOTION TO DISMISS AND MEMORAN-
DUM OF LAW IN SUPPORT OF TRAVERSE

Comes Now the petitioner, pro se, and does motion that this honorable court deny the respondents' motion to dismiss and further grant the petitioner such relief as he is entitled, entering judgment for the petitioner as the petitioner is entitled to review, reversal in part, remanding in part, and a final judgment in his favor. The following laws and authorities will better explain [sic] the petitioner's allegations:

* * *

5. As to allegations in challenge of the sufficiency of evidence to support the petitioner's conviction, the petitioner would be brief herein and recommend that the court see the petition for appeal and writ of habeas corpus traverse to motion to dismiss for arguments in support of the allegation(s).

The law in Virginia is clear that the recent and exclusive possession of stolen property will warrant a conviction of larceny unless the defendant affords a reasonable account of his possessions. In the case herein the petitioner would now incorporate the allegation of new evidence within this ground in answer thereof.

In the instant case the petitioner in explanation [sic] of his ownership explained that he had pursued with his attorney the matter of the fact that he had indeed bought most of the objects from Ronnie Elkins. This has stemmed [sic] the argument from the respondent's that West failed to raise the issue of Elkins with his counsel prior to the trial, which would have the petitioner further incorporate the allegation of counsel's ineffectiveness as to Ronnie Elkins [sic] investigation and objections. There is no way that the allegation's conglomerated herein can be separated and answered in a like manner. None are conclusory and none are frivolous. The petitioner explained [sic] in the transcript that he had purchased items from Ronnie Elkins. Raising the issue at trial allows it to be entered herein, further when asked why he did not have Elkins subpoenaed for the trial, the petitioner answered that he had not been confronted with the items until the trial itself. Noone [sic] contradicted this testimony, as noone [sic] informed West of what the items were and he did not see any [sic] of them until the trial itself, this left him no time prior to the trial to subpoena Elkins.

* * *

FILED: August 2, 1990

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-6686

FRANK ROBERT WEST, JR.,

Petitioner-Appellant,

versus

ELLIS B. WRIGHT, JR., Warden; MARY SUE TERRY,
Attorney General of Virginia,

Respondents-Appellees.

ORDER

For reasons appearing to the Court;

IT IS ORDERED that the parties shall file supplemental memoranda, not exceeding 15 pages in length, addressing the following questions. The first question is directed to appellant only:

1. Does West now contend that the use of the inference of larceny arising from recent possession of stolen goods is itself unconstitutional or rather that, even allowing use of the inference, the conviction was unconstitutional because not supported by sufficient evidence?

2. If West contends that the use of the inference is itself unconstitutional, was this claim presented to the Virginia courts as a claim

distinct from the general assertion that the evidence was insufficient to convict? (If so, please include citations to the joint appendix or record to support that response.)

3. If the answer to question 2 was yes, would a ruling by this court that the use of the inference was itself unconstitutional be a "new rule" under *Teague v. Lane*, 109 S. Ct. 1060 (1989); *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989); *Butler v. McKellar*, 110 S. Ct. 1212 (1990); and *Saffle v. Parks*, 110 S. Ct. 1257 (1990)?

The appellant shall serve and file his memorandum on or before August 17, 1990, in the Office of the Clerk and appellees shall serve and file their supplemental memorandum within 10 days after service of appellant's memorandum.

Entered at the direction of Judge Phillips for a panel consisting of Chief Judge Ervin, Judge Phillips and Judge Murnaghan.

For the Court

JOHN M. GREACEN
Clerk

* * *

* * *

APPELLANT'S MEMORANDUM IN RESPONSE TO
COURT'S ORDER OF AUGUST 6, 1990

ARGUMENT

- I. Does West now contend that the use of the inference of larceny arising from recent possession of stolen goods is itself unconstitutional or rather that, even allowing use of the inference, the conviction was unconstitutional because not supported by sufficient evidence?

West contends that he is raising both a claim that the "use of the inference of larceny arising from recent possession of stolen goods is itself unconstitutional" and that "even allowing use of the inference, the conviction was unconstitutional because not supported by sufficient evidence." West challenges, however, the use of the inference in this case. He does not claim that the inference, standing alone, may *never* prove guilt for larceny beyond a reasonable doubt.

It is true that West did not make a specific constitutional challenge to the use of the inference instruction itself and that such an objection can be made at trial. *County Court of Ulster v. Allen*, 442 U.S. 140, 165 (1979) (inference's validity as an instruction determined under the "more likely than not" standard).¹

¹ *Ulster* suggests that the inference could properly be given while the evidence as a whole would not prove guilt: the opinion closes by noting that "[t]he permissive presumption, as used in this case, satisfied the [more likely than not test]. And, as already noted, the New York Court of Appeals has concluded that the record as a whole was sufficient to establish guilt beyond a reasonable doubt." 442 U.S. at 167.

West's failure to make a specific *Ulster* objection is not significant and is not tantamount to a concession that the inference necessarily has some probative value here. When, as is the case here, the inference to be drawn from possession is the only proof of guilt, the line between an *Ulster* analysis of the validity of the inference instruction and a *Jackson* analysis that the inference does not prove guilt is, for practical purposes, non-existent. The Eleventh Circuit noted this in a case where a *Jackson* issue was raised but no objection to the instruction was made under *Ulster*:

The preceding discussion of *Ulster* illustrates that, although the validity of a permissive inference instruction and the sufficiency of the evidence in theory are distinct issues, in practice, where the primary evidence of guilt is the same as the evidence that gives rise to a permissive inference instruction, it is difficult to separate an *Ulster* analysis from a *Jackson v. Virginia* analysis.) (emphasis added).

Cosby v. Jones, 682 F.2d 1373, 1377 (11th Cir. 1982).

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-6686

FRANK ROBERT WEST, Jr.,
Appellant,

v.

ELLIS B. WRIGHT, Jr., WARDEN AND
MARY SUE TERRY, ATTORNEY GENERAL
OF VIRGINIA,
Appellees.

SUPPLEMENTAL MEMORANDUM FOR APPELLEES

* * *

West's assertion that, if accepted, his claim would not constitute a "new rule" because his conviction became final after *Jackson v. Virginia* was decided (West Memo at 5) is a *non-sequitur*. The questions posed by the Court correctly recognize that a *Jackson* sufficiency claim is entirely separate and distinct from a claim that Virginia's use of the permissive inference is "itself unconstitutional." The Commonwealth has never contended that *Jackson v. Virginia* is inapplicable to defendant's sufficiency claim. Nothing in *Jackson*, however, either "compelled" or "dictated" that Virginia's use of the permissive inference of guilt is "itself unconstitutional." And *Cosby v.*

Jones, the Eleventh Circuit case upon which West primarily relies, was not decided until two years after West's conviction became final.

* * *

6
No. 91-542

Supreme Court, U.S.

FILED

JAN 30 1992

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

ELLIS B. WRIGHT, JR., WARDEN, et al.,
Petitioners,

v.

FRANK ROBERT WEST, JR.,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

- I. In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?
- II. May a federal court grant collateral relief merely because it disagrees with the good faith reasonable decision of the state courts?
- III. May a federal court fundamentally alter the standard established by this Court in *Jackson v. Virginia* and vacate a state conviction on the basis of nothing more than "concern" about a deeply-rooted common law principle that the prisoner never raised in state court?

LIST OF PARTIES

The petitioners in this Court were the respondents in the proceedings below: Ellis B. Wright, Warden, and Mary Sue Terry, Attorney General of Virginia (hereafter "the Commonwealth"). The respondent, Frank Robert West, Jr., a Virginia prisoner, was the petitioner in the proceedings below.

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No. 91-542

In The
Supreme Court of the United States
October Term, 1991

ELLIS B. WRIGHT, JR., WARDEN, et al.,

Petitioners,

v.

FRANK ROBERT WEST, JR.,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 931 F.2d 262 (4th Cir. 1991). (Ptn. App. 1-22). The Fourth Circuit's amended order denying the Commonwealth's petition for rehearing and suggestion for rehearing en banc is reprinted in the appendix to the petition for a writ of certiorari. (Ptn. App. 34-35).

The memorandum opinion of the United States District Court for the Eastern District of Virginia, which denied West's petition for habeas corpus relief, is unreported. (Ptn. App. 23-33).

JURISDICTION

The judgment of the Fourth Circuit was entered on April 29, 1991. The amended order denying the Commonwealth's petition for rehearing was entered on July 8, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The petition for a writ of certiorari was filed on September 26, 1991, and initially was granted on December 16, 1991. An amended order granting certiorari was issued on December 18, 1991.

APPLICABLE PROVISIONS OF LAW

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution states in pertinent part, "[N]or shall any State deprive any person of life, liberty or property, without due process of law. . . ."

STATUTORY PROVISIONS

At the time of West's trial in 1979, Virginia Code § 18.2-95 provided in pertinent part that "[a]ny person who . . . [c]ommits simple larceny not from the person of another of goods and chattels of the value of \$100 or more, shall be deemed guilty of grand larceny which shall be punishable by confinement . . . for not less than one nor more than twenty years or in the discretion of the jury . . . [confinement] in jail for a period not exceeding

twelve months or [a fine of] not more than \$1,000, either or both." (Va. Code Ann. § 18.2-95 (Repl. Vol. 1975)).¹

The United States Code, 28 U.S.C. § 2254(a), provides that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Section 2243 of Title 28 provides in pertinent part that a federal habeas court "shall . . . dispose of the matter as law and justice require."

STATEMENT OF THE CASE

On December 13, 1978, Angelo Cardova secured his vacation home in Westmoreland County, Virginia, and did not return until December 26th, when he discovered that the home had been burglarized and that various items valued at about \$3,500 had been stolen. (Ptn. App. 2). On January 10, 1979, sheriff's deputies from Westmoreland and Northumberland Counties searched the Gloucester County home of Frank Robert West, Jr., and found numerous items that had been stolen from the Cardova residence. It is undisputed that West had exclusive possession of the stolen items. (Ptn. App. 2-3).

¹ The statutory minimum value has since been raised to \$200. See Va. Code Ann. § 18.2-95 (Repl. Vol. 1988).

West was indicted for grand larceny in Westmoreland County.² At trial, Mr. Cardova identified a wide variety of items found in West's possession as having been taken from his vacation home: two television sets, a sleeping bag, a shell-framed mirror, a coffee table, a ball-shaped hardwood carving, a synthetic-fiber fur coat with the name "Esther" embroidered in the lining, a box of flatware, a mounted lobster, a silk jacket with "Korea 1970" embroidered on the outside, and a record player. The value of Cardova's property recovered from West's residence was about \$1,100. (Ptn. App. 3).

West, who was a previously convicted felon, testified and denied stealing any of Cardova's property. He claimed to have "bought a lot of the merchandise [found in his home] from . . . flea bargain places," where "a lot of times you buy things . . . that are stolen," but "[t]he biggest part of the time you never know it." (J.A. 21).

West also claimed that he bought some of Cardova's property for \$500 from a man named Ronnie Elkins (J.A. 22), but had no explanation for his possession of Cardova's coffee table or a color television bearing Cardova's social security number. (J.A. 23, 28-29). At first, West stated that the purchase from Elkins occurred in Newport News, but later said the transaction took place in Gloucester. (J.A. 22, 26). According to West, the transaction with Elkins took place before January 1, 1979. (J.A. 25, 27). "Ronnie Elkins," however, did not testify and the

² West also was indicted for burglary but the Commonwealth elected not to prosecute that charge. (J.A. 4-5).

defense presented no evidence to support West's testimony.³

Even the court below conceded that West's explanation to the jury "was somewhat confused and [that] he was unable to account for how he acquired some of the merchandise." (Ptn. App. 4). In fact, the court admitted that "at first blush [West's testimony] may itself seem incredible, thereby drawing all else in question." (Ptn. App. 19, n.7). The very best that the Fourth Circuit could say about West's "explanation" was that "there was nothing inherently implausible about" it. (Ptn. App. 18).

The jury was properly instructed, without objection, on the Commonwealth's burden of proof beyond a reasonable doubt, West's presumption of innocence, the jury's role in assessing the credibility of witnesses, and the proper use of circumstantial evidence. (J.A. 32-36). Included in the instructions regarding circumstantial evidence was an instruction that required the jury "to scan such evidence with great care and caution" and to acquit West unless it had "a moral conviction of guilt of the defendant beyond a reasonable doubt." (J.A. 35-36). The jury was also properly instructed on the elements of the offense. (J.A. 33-34).

³ It was revealed during the state habeas corpus proceedings that prior to trial West "repeatedly advised counsel he had no witnesses" who could testify on his behalf. (Ptn. App. 31). In fact, West instructed his trial attorney to "put him on the stand and he (West) would do the rest." (J.A. 45). He refused to tell his attorney the details of what his testimony would be, and counsel had never heard the name "Ronnie Elkins" until West testified at trial. (J.A. 45-46).

Concerning Virginia's longstanding common law inference involving exclusive possession of recently stolen property, the jury was instructed:

If you believe from the evidence beyond a reasonable doubt that property of a value of \$100.00 or more was stolen from Angelo F. Cardova, and that it was recently thereafter found in the exclusive and personal possession of the defendant, and that such possession has been unexplained or falsely denied by the defendant, then such possession is sufficient to raise an inference that the defendant was the thief; and if such inference, taking into consideration the whole evidence, leads you to believe beyond a reasonable doubt that the defendant committed the theft, then you shall find the defendant guilty.

(Ptn. App. 4). West did not object to this instruction at trial and has never claimed that the instruction was erroneous.⁴ The jury found the petitioner guilty of grand larceny and sentenced him to ten years imprisonment.

West's direct appeal raised several issues, including whether the evidence was sufficient to support his conviction. The thrust of his sufficiency claim was that West had provided a reasonable explanation for his possession of the stolen property. (J.A. 38-40). No claim attacking the

⁴ Both West and the Fourth Circuit have acknowledged that the inference described in this instruction was "permissive" rather than mandatory. (Br. Op. 7-10; Ptn. App. 4, 8). This case, therefore, is not one where it is alleged that a mandatory presumption improperly shifted the burden of proof from the prosecution to the defendant. See, e.g., *Sandstrom v. Montana*, 442 U.S. 510 (1979).

validity of Virginia's common law inference was raised. On May 30, 1980, the Supreme Court of Virginia, finding no reversible error, refused the petition. (J.A. 41).

On May 10, 1987 – almost eight years after his conviction – West filed a petition for a writ of habeas corpus in the Supreme Court of Virginia. That petition repeated the claim that the evidence was insufficient to support his conviction, but again, there was no attack upon the validity of the common law inference. (J.A. 42-43). The petition was denied and dismissed on May 13, 1988. (J.A. 48-49).

On June 12, 1988, West filed his federal habeas petition in the United States District Court for the Eastern District of Virginia, Richmond Division. Included in his petition was his claim that the evidence was insufficient to support his conviction; yet again, however, West did not attack the validity of Virginia's common law inference. (J.A. 50-51, 55-56). United States District Judge James R. Spencer applied the constitutional standard established by this Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), and found that "there was sufficient evidence upon which a rational trier of fact could find West guilty beyond a reasonable doubt." (Ptn. App. 28). Judge Spencer specifically noted West's attempt to explain his possession of the stolen goods, but concluded that "[i]t is clear from the evidence that the defendant was found in possession of recently stolen property, and that the jury did not believe his explanation." (Ptn. App. 28).

On April 29, 1991, however, a panel of the Fourth Circuit reversed the district court because West's grand larceny conviction supposedly violated "due process."

(Ptn. App. 20). The panel did so only after expressing its "concern about the continued viability of the inference's basic premise" and stating its belief that the "premise [for the inference] has been substantially undercut by intervening technological and demographic developments," whatever that means. (Ptn. App. 11-13). The appeals court conceded, however, that the jury had been properly instructed with respect to the inference. (Ptn. App. 20).

On May 10, 1991, the Commonwealth petitioned for rehearing with a suggestion for rehearing en banc. The ten judges of the Fourth Circuit split evenly on whether to grant a rehearing en banc, and the Commonwealth's petition was thus denied. (Ptn. App. 34-35).

This Court granted certiorari in an amended order dated December 18, 1991. *See* 112 S.Ct. 672 (1991).

SUMMARY OF ARGUMENT

Virginia's position is very simple: a federal court's mere disagreement with a state court's decision does not, and should not, furnish a basis for collateral relief, regardless of whether the issue is labeled "factual," "legal," or a so-called "mixed" issue of law and fact.

Over the past few years, this Court has returned to the abiding principle that a federal habeas corpus court normally should defer to the resolution of a state prisoner's constitutional claim by the state's highest court. *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny now command deferential, rather than *de novo*, review. Unless the state court decision truly can be deemed disobedient to the Constitution, *i.e.*, no reasonable jurist could have

rejected the prisoner's claim, a federal court may not substitute its own judgment for the state court's.

Limiting independent federal collateral review to the rare instances of state judicial constitutional disobedience is faithful to the core purpose of the writ of habeas corpus and makes great good sense as well. Under even the most restrictive view of *Teague*, state court decisions generally are immune from *de novo* federal collateral review if the prisoner is asserting a "new" legal principle; under 28 U.S.C. § 2254(d), state court findings of fact are presumptively immune from such review. If neither legal nor factual issues are entitled as a matter of "right" to *de novo* review, then surely there is no justification for incurring the significant costs of permitting such review of state court applications of settled law to historical fact. Indeed, those costs are particularly high in such a context because in most instances, as here, a federal ruling contrary to the state court decision constitutes nothing more than mere disagreement on a matter upon which reasonable courts could differ.

Federal deference to reasonable, good faith state court judgments fosters and protects the interests of finality, comity and federalism that are at the heart of federal review of state convictions under § 2254. These important interests, however, cannot long survive if, as happened here, a federal appeals court may overturn a twelve-year-old conviction simply because it disagrees with a firmly-engrained principle of a state's common law and the manner in which it was applied in a given case.

For centuries, judges and juries have been permitted to infer that the possessor of recently stolen goods is the

thief. Thus, where it was undisputed that West was found in exclusive possession of recently stolen goods and where the jury clearly rejected West's unsupported attempt to explain such possession, the state court decisions affirming his grand larceny conviction against a sufficiency-of-the-evidence challenge were unquestionably reasonable. The Fourth Circuit's second-guessing of those decisions on the basis of its "concern" about the modern-day viability of the common law inference – a matter never raised by West in state court or in the district court – simply cannot be squared with this Court's cases circumscribing the scope of federal collateral review. See generally *Estelle v. McGuire*, 112 S.Ct. 475, 478 (1991) (emphasizing "the limited scope of federal habeas review of state convictions").

Teague's deference principle converges in this case with the similar teaching of *Jackson v. Virginia*, 443 U.S. 307 (1979). If a state court has rejected a prisoner's sufficiency-of-the-evidence claim in a reasonable, rational manner, then both *Teague* and *Jackson* command deference to that determination by a federal habeas court.

The Fourth Circuit's decision in this case plainly violates both *Teague* and *Jackson*. By the Court of Appeals' own admission, its resolution of West's claim was a "judgment call" and represents nothing more than a "disagreement" with the resolution reached by the jury, the state trial judge, a unanimous Supreme Court of Virginia, and the federal district court. But a mere difference of opinion is a woefully inadequate justification for incurring the significant costs that the granting of federal habeas relief entails.

ARGUMENT

I

A FEDERAL HABEAS CORPUS COURT REVIEWING THE CONSTITUTIONAL CLAIM OF A STATE PRISONER MUST DEFER TO THE STATE COURT'S RESOLUTION OF THE CLAIM IF THAT DECISION WAS REASONABLE WHEN MADE.

A. Federal Collateral Review of State Convictions Is Governed by a Standard of Reasonableness.

The notion that a state prisoner has a right to *de novo* federal collateral review of his constitutional claims, see *Brown v. Allen*, 344 U.S. 443, 500-501 (1953) (Frankfurter, J., concurring), surely has not survived this Court's decisions in *Teague v. Lane*, 489 U.S. 288 (1989), *Butler v. McKellar*, 110 S.Ct. 1212 (1990), and *Saffle v. Parks*, 110 S.Ct. 1257 (1990).⁵ The "reasonableness" standard of

⁵ Justice Frankfurter's concurring opinion in *Brown* is at odds with the majority opinion in that case that expressly stated that a federal district court may exercise its discretion to defer to a prior adjudication by a state court. See *Brown*, 344 U.S. at 463, 465. A subsequent pronouncement by a bare majority of this Court in *Townsend v. Sain*, 372 U.S. 293, 318 (1963), to the effect that a federal court may never defer to a state court's findings of law, mistakenly relied upon the Frankfurter concurrence rather than the majority opinion in *Brown*. See Criminal Justice Legal Foundation Amicus Brief in *Keeney v. Tamayo-Reyes*, No. 91-1859 at 3-19 (explaining why *Townsend* has little or no precedential value). Justice Frankfurter's concurrence in *Brown*, moreover, made no attempt to explain what had created the "right" to *de novo* federal review in the three short years since *Darr v. Burford*, 339 U.S. 200 (1950), where the Court had said that a federal court "may decline to examine further into the merits [of a state prisoner's claim] because they have

(Continued on following page)

collateral review as announced and applied in these cases is premised on a recognition that this Court has " 'never defined the scope of the writ [of habeas corpus] simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error.' " *Teague*, 489 U.S. at 308, quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (emphasis added). To the contrary, the "interests of comity and finality must also be considered in determining the proper scope of habeas review." *Teague*, 489 U.S. at 308; see also *Brecht v. Abrahamson*, 944 F.2d 1363, 1372 (7th Cir. 1991) (Easterbrook, J.) ("Today - as for most of our history - the Court puts considerations of finality and federalism at the forefront of any discussion of the scope of collateral review.").

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already been decided against the petitioner." 339 U.S. at 215. *Darr's* laudable goal was the avoidance of "repeated adjudications of the same issues by courts of coordinate powers." *Id.* Just nine years before *Brown*, moreover, this Court stated in *Ex parte Hawk*, 321 U.S. 114, 118 (1944), that "[w]here the state courts have considered and adjudicated the merits of [a state prisoner's] contentions, . . . a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated." Nevertheless, although it "was not easily arrived at," the rule immediately prior to *Teague* was that a federal habeas court generally could "overturn the judgment of the highest court of a State insofar as it deals with the application of the United States Constitution or laws to the facts in question." See *Sumner v. Mata*, 449 U.S. 539, 543-544 (1981). For a concise history of the manner in which this Court has expanded and, more recently, contracted the scope of the writ, see *Brecht v. Abrahamson*, 944 F.2d 1363, 1372 (7th Cir. 1991). See also *Stone v. Powell*, 428 U.S. 465, 474-478 (1976).

The "significant costs of federal habeas review" of state convictions have been well documented by this Court. See *McCleskey v. Zant*, 111 S.Ct. 1454, 1468-1469 (1991). Issuance of the writ "strikes at finality." *Id.* at 1468. "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague*, 489 U.S. at 309, citing *Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 150 (1970), and *Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 450-451 (1963). Lack of finality, in turn, adversely affects federal/state comity because, while "[o]ur federal system recognizes the independent power of a State to articulate societal norms through criminal law . . . the power of a State to pass laws means little if the State cannot enforce them." *McCleskey*, 111 S.Ct. at 1469. It was these fundamental concerns that led to this Court's decision in *Teague*. See generally *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976) ("Resort to habeas corpus . . . results in serious intrusions on values important to our system of government.").

In its most basic form, the *Teague* doctrine precludes a federal habeas court from affording a state prisoner the benefit of a case decided after his own case became final on direct appeal, except in two limited circumstances not involved here.⁶ 489 U.S. at 311. This doctrine was

⁶ The first *Teague* exception relates to claims that place an entire category of conduct or persons beyond the reach of the criminal law, either as to conviction or punishment. See *Teague*, 489 U.S. at 311. See also *Penry v. Lynaugh*, 492 U.S. 302, 329-330 (1989) (first exception covers a proposed new rule that would have "prohibited the execution of mentally retarded persons").

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premised on the Court's agreement with Justice Harlan that the foremost purpose of the writ is to deter judicial disobedience to the Constitution and that this deterrence function is accomplished sufficiently if the habeas court applies the constitutional standards that prevailed at the time of the state court decision. *Id.* at 306, citing *Desist v. United States*, 394 U.S. 244, 262-263 (1969) (Harlan, J., dissenting).

The *Teague* doctrine also reinforces the traditional distinction between the type of federal review available from this Court on direct appeal from a state conviction and the more limited type available from the lower federal courts in a collateral proceeding. *Teague*, 489 U.S. at 306, quoting *Mackey v. United States*, 401 U.S. 667, 682-683 (1971) (separate opinion of Harlan, J.) ("Habeas corpus . . . is not designed as a substitute for direct review."); see also *Brecht*, 944 F.2d at 1374 ("Collateral review is not supposed to be a replay of the direct appeal").

Teague makes clear, then, that an entire category of purely legal claims is shielded from *de novo* federal collateral review.⁷ State court factual findings, on the other hand, are shielded from *de novo* review by 28 U.S.C.

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The second relates to claims that create new "watershed" principles "without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313.

⁷ *Teague*, of course, was not the first case to demonstrate the point that there is no "right" to *de novo* federal collateral review of a constitutional claim. See *Stone v. Powell*, 428 U.S. at 481-482 (Fourth Amendment claims); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (procedurally defaulted claims of any type).

§ 2254(d) and this Court's cases strictly enforcing the statutory "presumption of correctness." See, e.g., *Sumner v. Mata*, 449 U.S. 539 (1981). Thus, if the Fourth Circuit had framed West's claim as either a purely legal one (for example, the constitutionality of Virginia's common law inference) or as a purely factual one, *de novo* review clearly would have been precluded. It is impossible, therefore, to justify such intrusive plenary federal review simply because West's sufficiency claim can be characterized as a so-called "mixed" question of applying law to historical fact.⁸

Implicitly recognizing that impossibility, this Court has held that a ban on retroactive application of newly-decided cases is not the only precept of the *Teague* doctrine. When state courts make "reasonable, good-faith interpretations of existing precedents," a subsequent ruling to the contrary by a federal habeas court is prohibited. *Butler v. McKellar*, 110 S.Ct. at 1217. In *Butler*, the majority expressly noted the prisoner's argument that the *Teague* doctrine did not apply to his case because the claim he was advancing "was merely an application of *Edwards* [*v. Arizona*, 451 U.S. 477 (1981)] to a slightly different set of facts." *Butler*, 110 S.Ct. at 1217. The Court rejected *Butler*'s argument because the determinative factor is *not* whether a claim is "controlled" or "governed"

⁸ There is, of course, no such thing as a question of "pure law." The determination of *any* legal issue requires application of some pre-existing legal principle to a set of facts that will vary in specificity from case to case. The only difference between a "pure" legal issue and a so-called "mixed" one is that the former can be applied more mechanically and the latter is more fact-intensive. But they are both legal issues.

by a prior decision, but whether the claim being advanced "was susceptible to debate among reasonable minds" at the time it was rejected by the state courts. *Id.*

Thus, while *Teague* precludes *de novo* collateral review of "new" constitutional claims based upon cases decided after a state prisoner's conviction became final, *Butler* erects a similar bar with respect to claims involving applications of settled law to a given set of facts. Simply put, this Court already has held that so long as the state court's application of existing constitutional precedent to the historical facts was reasonable, a federal habeas court must defer to that resolution.

The import of *Butler* is evidenced, not only by the majority's rejection of *Butler*'s "mere application" argument, but by the dissent's response to the Court's decision. Writing for Justices Marshall, Blackmun and Stevens, Justice Brennan stated:

[T]he majority today limits federal courts' habeas corpus function to reviewing state courts' legal analysis under the equivalent of a 'clearly erroneous' standard of review. A federal court may no longer consider the merits of the petitioner's claim based on its best interpretation and application of the law prevailing at the time her conviction became final; rather it must defer to the state court's decision rejecting the claim unless the decision is patently unreasonable.

110 S.Ct. at 1221 (emphasis added, footnote omitted). See also *id.* at 1219 ("a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was so clearly invalid under then-prevailing legal standards that the decision could

not be defended by any reasonable jurist") (emphasis in original).⁹

On the same day *Butler* was decided, the Court also applied the "reasonableness" standard of collateral review in *Saffle v. Parks*. The state prisoner in *Saffle* claimed "that an instruction in the penalty phase of his trial, telling the jury to avoid any influence of sympathy, violates the Eighth Amendment." 110 S.Ct. at 1258. As support for this claim, the prisoner relied on *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), both of which were decided before his conviction and sentence became final. *Saffle*, 110 S.Ct. at 1260. Nevertheless, the Court found that granting collateral relief on such a claim would violate the *Teague* doctrine:

⁹ The *Butler* dissent is also instructive because it shows that the arguments West will no doubt raise in favor of *de novo* review have already been rejected by this Court. For instance, Justice Brennan unsuccessfully argued that Congress supposedly had expressed a clear intent that the constitutional claims of state prisoners be subject to *de novo* review. 110 S.Ct. at 1224-1225. He also argued that such plenary review is necessary to deter state courts from allowing constitutional violations to go unremedied. *Id.* at 1222. The former argument is simply wrong. See *Duckworth v. Eagan*, 492 U.S. 195, 212 (1989) (O'Connor & Scalia, JJ., concurring); 28 U.S.C. § 2243 (federal habeas court must "dispose of the matter as law and justice require"). The latter argument, although implicitly rejected in *Butler*, was rejected expressly in *Sawyer v. Smith*, 110 S.Ct. 2822, 2827 (1990) ("This argument is premised on a skepticism of state courts that we decline to endorse. State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution."). Indeed, there is no sufficient justification for federal *de novo* review - either in practice, policy, fact or law.

We . . . cannot say that the large majority of federal and state courts that have rejected challenges to antisympathy instructions . . . have been *unreasonable* in concluding that the instructions do not violate the rule of *Lockett* and *Eddings*. . . . Even were we to agree . . . that our decisions in *Lockett* and *Eddings* inform, or even control or govern the analysis of [the prisoner's] claim, it does not follow that they compel the rule that [he] seeks.

110 S.Ct. at 1261 (emphasis added). A federal habeas court, the Court concluded, must "validate reasonable, good faith *interpretations* of existing precedents made by state courts." *Id.* at 1260 (emphasis added).

Both *Butler* and *Saffle* thus extended the *Teague* doctrine beyond an ordinary concept of non-retroactivity: where a petitioner relies on a legal principle established before his case became final and asserts that he is entitled to federal collateral relief when that principle is applied to the facts of his case, such relief normally is precluded unless the merits of his claim were so clear at the time of the state court decision that no reasonable jurist could have rejected it. See *Butler*, 110 S.Ct. at 1217; *Saffle*, 110 S.Ct. at 1260-1261.

As a general proposition, therefore, a state prisoner is not entitled to *de novo* federal collateral review of his constitutional claims.¹⁰ Whether the case involves a

¹⁰ In *Miller v. Fenton*, 474 U.S. 104, 112 (1985), this Court held that "the ultimate question whether, under the totality of the circumstances, [a] challenged confession was obtained in a manner compatible with the requirements of the Constitution,

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"new" legal question or an issue involving the application of settled law to historical fact, if the prisoner had a full and fair opportunity to litigate his claim in state court,¹¹ a federal habeas court may not second-guess the state court's decision unless that decision was tantamount to an act of judicial disobedience. Limiting *de novo* review to such instances is entirely consistent with the central purpose of the writ. See *Teague*, 489 U.S. at 306; *Brecht*, 944 F.2d at 1375 ("Federal courts should discourage recalcitrance and reward full consideration - which

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is a matter for independent federal determination." *Miller*, of course, is a pre-*Teague* case and therefore is not controlling. This point is underscored by the fact that in *Butler* this Court implicitly rejected the dissent's reliance on *Miller*. See *Butler*, 110 S.Ct. at 1225 n. 10 (Brennan, J., dissenting). And while *Miller's* "independent federal determination" language was repeated after *Teague* in *Arizona v. Fulminante*, 111 S.Ct. 1246, 1252 (1991), *Fulminante* was a direct appeal case, not a collateral proceeding. *Miller*, moreover, went to great lengths to emphasize the unique nature of coerced confession claims and to limit its holding to that context. 474 U.S. at 115-118. It certainly cannot support the broader conclusion that a state prisoner has a general right to *de novo* federal collateral review of his constitutional claims.

¹¹ *Butler* premises federal court deference not only on the "reasonableness" of the state court decision, but also on its "good faith." 110 S.Ct. at 1217. The *Teague/Butler* "reasonableness" standard thus clearly complements the "full and fair opportunity" standard articulated in *Stone v. Powell*, 428 U.S. at 481-482. If both standards are met, redundant *de novo* federal review can be justified only by a distrust of state judges - a theory this Court has rejected repeatedly. See, e.g., *Sawyer v. Smith*, 110 S.Ct. at 2827; *Sumner v. Mata*, 449 U.S. at 549; *Stone v. Powell*, 428 U.S. at 493 n.35.

they cannot if they review every constitutional claim from scratch.").

B. Sound Policy Considerations Support the "Reasonableness" Standard.

Under even the most basic view of the *Teague* doctrine, reasonable good faith decisions by state courts on so-called "pure law" issues are insulated from *de novo* federal collateral review, "even though they are shown to be contrary to later decisions." *Butler*, 110 S.Ct. at 1217. Thus, even where it can be said with some degree of certainty that the state court's determination turned out to be "wrong," the costs to the interests of finality and comity are too great to permit independent federal collateral review. See *Teague*, 489 U.S. at 310.

If there is no right to *de novo* federal review of a state court decision that was reasonable when rendered, but nevertheless ultimately "wrong," then surely there is no right to such review of reasonable state court applications of settled law to a particular set of historical facts. After all, when a federal habeas court subsequently reaches a contrary conclusion on such an issue, it cannot be said with any degree of certainty that the federal court is "right" and the state court was "wrong:"

[Such a] reversal . . . is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would be reversed. We are not final because we are infallible, but we are infallible only because we are final.

Brown v. Allen, 344 U.S. at 540 (Jackson, J., concurring); see also *Bator, supra*, at 509 ("Is there any sense in which the federal courts will, in the abstract, be more 'correct' with respect to issues of federal law than state courts? Surely not.").

Thus, if the state court afforded the prisoner the opportunity for a full and fair consideration of his claim and applied the law to the facts in a reasonable manner, a federal court's granting of collateral relief based upon mere disagreement with that decision is even *more* intrusive than the type of federal intervention clearly proscribed by *Teague*. By force of logic, therefore, there can be no justification for permitting *de novo* federal collateral review of a state court's application of law to a particular set of facts. See generally *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2460 (1990) (deference, not *de novo* review, is appropriate when reviewing "fact-intensive, close calls").

As this Court recognized in *Miller v. Fenton*, 474 U.S. 104, 113-114 (1985), the distinction "between a pristine legal standard and a simple historical fact" is difficult to discern and is often resolved as "a matter of allocation" rather than "analysis." Failure to apply the reasonableness standard to state court applications of law to fact would commit the federal courts to a difficult and unproductive regime of policing, not only the murky boundary between law and fact, but the equally shadowy line between "new rules" and "mere applications." Surely, this is not a wise allocation of time and resources for the federal courts in situations where the state court already has resolved the matter reasonably. See *Brecht*, 944 F.2d at 1373 ("[W]hile federal courts re-do the decisions

already made by the state courts, federal business languishes.").

The reasonableness standard, on the other hand, offers a familiar, easily-applied, bright-line test that simplifies matters greatly for the lower federal courts: if a state prisoner had a full and fair opportunity to raise his claim and the state courts resolved the claim in an objectively reasonable manner, a federal habeas court *must* defer to that decision. In combination with § 2254(d), the unitary reasonableness standard requires that *all* state court findings – legal, factual, and “mixed” – be regarded as presumptively correct. Federal relief is available if, and only if, no reasonable jurist could have rejected the prisoner’s claim.

This does not mean, however, that a state prisoner will be without a federal remedy merely because the state court ruled in favor of the government. To the extent that the prisoner’s claim is *fact*-dependent, he can obtain *de novo* federal review if he can meet any one of the eight statutory exceptions to § 2254(d).¹² To the extent his claim

¹² Under § 2254(d), a state court’s finding of fact “shall be presumed to be correct” unless it is established:

- (1) that the merits of the factual dispute were not resolved in the State court hearing;
- (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
- (3) that the material facts were not adequately developed at the State court hearing;

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raises *legal* issues, relief is available if he can show that the state court decision was unreasonable or that one of the two *Teague* exceptions exists. But if the state provided a fair forum for consideration of the claim, and if the state court reached a reasonable result, that decision will stand *and should stand*.

Finally, reserving *de novo* federal collateral review for those rare instances where the state court decision constitutes an act of judicial constitutional disobedience has a salutary effect not only on the constitutional interests of finality and comity, but also on society’s effort to rehabilitate criminal offenders:

A procedural system which permits an endless repetition of inquiry into facts and law in a vain

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- (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court hearing;
- (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
- (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
- (7) that the applicant was otherwise denied due process of law in the State court proceeding;
- (8) or unless . . . the Federal court on a consideration of . . . the record as a whole concludes that such factual determination is not fairly supported by the record. . . .

search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands. Furthermore, we should at least tentatively inquire *whether an endless reopening of convictions*, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders. The first step in achieving that aim may be a realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation; and a process of reeducation cannot, perhaps, even begin if we make sure that the cardinal moral predicate is missing, if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place. The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility.

Bator, *supra*, at 452 (emphasis added, footnotes omitted). See also *Schneekloth v. Bustamonte*, 412 U.S. 218, 262 (1973) (Powell, J., concurring); *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting); Friendly, *supra*, at 146.

The possible justifications for *de novo* federal habeas review, and for the consequent message to a state prisoner that he might yet escape responsibility for his crime, are at their low ebb where, as here, the proposed federal review can produce, at best, only a mere disagreement with a decision reasonably reached by the state courts. *Teague* and its progeny rightly demand federal deference

to such state court determinations, and the Fourth Circuit clearly failed to follow that mandate.

II

THE COURT BELOW IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THE REASONABLE GOOD FAITH JUDGMENT REACHED BY THE STATE COURTS.

The Fourth Circuit did not question the reasonableness of the Virginia courts' rejection of West's sufficiency-of-the-evidence claim. The Court of Appeals merely concluded that it was "right" and that the state courts were wrong. (Ptn. App. 21). To make matters worse, collateral relief was premised on a theory that not only was never raised in state court, but which had never even been mentioned in the district court. Such a flagrant violation of both the *Teague* and procedural default doctrines cannot be permitted to stand.

A. *The Court of Appeals Failed to Apply the Teague Standard of Reasonableness.*

Determining whether a state court's rejection of a petitioner's claim was "reasonable" and in "good faith" requires a determination of whether constitutional precedent existing at the time the petitioner's conviction became final "compelled" a decision in his favor. *Saffle*, 110 S.Ct. at 1261. Acceptance of a petitioner's claim cannot be considered to have been "compelled," however, if it was "susceptible to debate among reasonable minds." *Butler*, 110 S.Ct. at 1217. And this Court has expressly cited as evidence that a claim is "susceptible to debate"

the fact that the claim has been rejected by other courts. *Id.*

It would be difficult to imagine a more clear-cut deviation from this standard of review than the decision of the court below.¹³ West's sufficiency claim was rejected by the state trial judge, all seven members of the Virginia Supreme Court, and a federal district court judge. This concurrence of judicial opinion demonstrates, at the very least, that West's claim was not "dictated" or "compelled" in 1979 or now by *Jackson v. Virginia*.¹⁴

The intrusive "second-guessing" indulged in by the Fourth Circuit is precisely the type of federal intervention the "reasonableness" standard was meant to proscribe. The Court of Appeals conceded that its decision was "a judgment call" (Ptn. App. 13-14) and that it represented a "disagreement on [a] fundamental matter with a properly instructed state jury of twelve, a state trial judge, the state's supreme court, and a federal district judge. . . .

¹³ The Fourth Circuit conceded that neither of the exceptions to the *Teague* doctrine was applicable to West's claim. (Ptn. App. 9, n.3).

¹⁴ The primary case upon which the Fourth Circuit relied, moreover, was not decided until more than two years after West's conviction became final. See *Cosby v. Jones*, 682 F.2d 1373 (11th Cir. 1982) (setting forth five-part analysis for assessing sufficiency challenges to convictions based on "recent possession" inference). And the Fourth Circuit's violation of the *Teague* doctrine is only highlighted by the fact that the *Jackson* "rational factfinder" test is less demanding of the prosecution than the "every reasonable hypothesis of innocence" standard the Virginia Supreme Court applied to West's sufficiency claim on direct appeal. See *Jackson*, 443 U.S. at 326; *Inge v. Procunier*, 758 F.2d 1010, 1014 (4th Cir.), cert. denied, 474 U.S. 833 (1985).

from a vantage point far removed from the immediacy of the testimonial evidence whose sufficiency is at issue." (Ptn. App. 20). But after stating the very reason why federal courts must defer to state courts, the Fourth Circuit did *exactly* what it may not do: it substituted its own "judgment call" for the reasonable good faith judgment of the state courts. See *Brecht*, 944 F.2d at 1367 ("The district judge substituted her assessment for that of the Supreme Court of Wisconsin: she did not say that its opinion is unreasoned or beyond the bounds of dispute; she simply disagreed. That is not an appropriate stance for a federal judge engaged in collateral review of a state conviction.").

B. *The Court Of Appeals Violated the Procedural Default Doctrine.*

The Court of Appeals' decision is doubly intrusive because it is replete with references to a "growing discomfort . . . about allowing convictions in this day and age to be based solely upon [the common law] inference" and the court's belief that "the basic premise of the inference . . . has been substantially undercut by intervening technological and demographic developments." (Ptn. App. 11-13). But the continued vitality of the common law inference was *never* challenged by West in state court.¹⁵ Nor for that matter was it ever mentioned by West in the district court.

¹⁵ West does not contend, and the Fourth Circuit was careful not to rule, that the common law inference is unconstitutional on its face. (Ptn. App. 6-8). Indeed, the Court of

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The sufficiency claim West asserted on direct appeal in the Virginia Supreme Court expressly acknowledged the validity of the inference under Virginia law: "The law in Virginia is clear that the recent and exclusive possession of stolen property *will warrant a conviction of larceny* unless the defendant affords a reasonable account of his possession." (J.A. 39, emphasis added). West's claim was *not* that the common law inference had lost any of its vitality, but simply that "the inference of guilt which the Commonwealth may have established was rebutted" by his explanation at trial. (J.A. 40). The Virginia Supreme Court rejected that claim, and West's conviction became final in 1980 when he failed to petition this Court for a writ of certiorari.

Seven years later, West initiated state habeas proceedings by filing a petition in the Virginia Supreme Court which raised the very same sufficiency claim he

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Appeals went so far as to assume expressly, without deciding, that the inference is constitutional. (Ptn. App. 17, n.6). But this was only after the court's post-argument inquiry whether West was challenging the constitutionality of the inference itself (J.A. 57-58), and West's admission in response that he had not objected at trial to the constitutionality of the instruction that explained the inference to the jury. (J.A. 59). The reason for the Fourth Circuit's scrupulous avoidance of this issue is clear: any such frontal assault on the constitutionality of the inference certainly would be barred from federal review by West's undeniable failure to raise it in state court, *see Wainwright v. Sykes*, 433 U.S. at 87, and, as the Fourth Circuit all but acknowledged, by a straightforward application of *Teague*: "If that were the claim, it might be arguable that its vindication would violate the 'no new rule' limitation" of *Teague*. (Ptn. App. 10).

had raised on direct appeal. The petition said nothing about the continued validity of the common law inference. (J.A. 42-43). The Supreme Court dismissed the sufficiency claim because it had already been rejected on direct appeal. (J.A. 48, citing *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970)).

West, moreover, never even hinted at an allegation about the inference's modern-day applicability when he filed his petition in the district court. (J.A. 50-51, 55-56). The district court's opinion shows no sign that West raised any concern about the vitality of the common law inference in modern times; to the contrary, the district judge approached the allegation of insufficient evidence as a straightforward *Jackson* claim, applied the proper standard of review, and deferred to the jury's assessment of West's credibility as mandated by *Jackson*: "It is clear from the evidence . . . that the jury did not believe [West's] explanation." (Ptn. App. 27-28).

West did not attempt to seek certiorari review in this Court on direct appeal. But if he had done so, this Court would have been without jurisdiction to review a claim challenging the modern-day validity of the common law inference because no such claim had been raised in the Virginia Supreme Court. *See* 28 U.S.C. § 1257; Rule 14.1(h). By granting West collateral relief on the basis of an argument never raised in state court, the Fourth Circuit simply allowed him "an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws." *See Coleman v. Thompson*, 111 S.Ct. 2546, 2554 (1991). Such an "end run" is totally at odds with the *Teague* and procedural default doctrines and, if given an imprimatur by this Court, will

have a ruinous effect on the vital state interests those doctrines were established to foster and protect.

III

THE COURT BELOW WAS UNFAITHFUL TO JACKSON V. VIRGINIA'S PRINCIPLE OF DEFERENCE.

Even before the advent of *Teague*'s reasonableness standard, a federal court reviewing a due process claim that the evidence was insufficient to support a state court conviction was governed by the equally deferential standard set forth in *Jackson v. Virginia*. Under *Jackson*, all the evidence must be viewed in the light most favorable to the prosecution, and the claim must be rejected unless no rational trier of fact could have concluded that the prisoner was guilty beyond a reasonable doubt. 443 U.S. at 319. This deferential analysis applies not only to review of a jury's verdict, but also to the decisions of state appellate courts upholding such a verdict against a sufficiency challenge. See *Lewis v. Jeffers*, 110 S.Ct. 3092, 3103 (1990) ("These considerations apply with equal force to federal habeas review of a state court's finding of aggravating circumstances").

Jackson, moreover, expressly held that the reviewing court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* Indeed, *Jackson* requires that "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of

the prosecution, and must defer to that resolution." *Id.* at 326 (emphasis added); see also *Sawyer v. Whitley*, 945 F.2d 812, 821 (5th Cir.) ("The core concern of the *Jackson* Court, in designing the sufficiency review, was to insulate the discretionary function of the jury from judicial scrutiny"), cert. granted, 112 S.Ct. 434 (1991).

Jackson was thus a precursor of the *Teague* doctrine. The same mandatory deference that *Jackson* required of federal courts with respect to a particular type of constitutional claim, *Teague* and its progeny now require with respect to all claims raised by a state prisoner in a federal collateral proceeding.

A. *The Court of Appeals Eviscerated the Common Law Inference.*

Jackson explicitly requires that the sufficiency inquiry "be gauged in the light of applicable [state] law." 443 U.S. at 324. At the heart of the sufficiency inquiry in West's case is Virginia's longstanding common law principle that the exclusive possession of recently stolen goods permits the inference of theft. Under *Jackson*, the Court of Appeals was required to respect this tenet of Virginia law. Instead, collateral relief was granted only after the common law principle had been reworked and emasculated.

The Fourth Circuit readily conceded that "[t]he inference that one found in unexplained possession of recently stolen goods was a participant in the theft is an ancient one." (Ptn. App. 11). See generally *Barnes v. United States*, 412 U.S. 837, 843-844 n.5 (1973), quoting Thayer, *Preliminary Treatise on Evidence* 328 (1898) ("[T]he laws of Ine [King of Wessex, A.D. 688-725] provide that, 'if stolen

property be attached with a chapman, and he have not brought it before good witnesses, let him prove . . . that he was neither privy (to the theft) nor thief"); *see also* 2 East's, Pleas of the Crown 656 (1716) ("Wherever the property of one man . . . is found (recently after the taking) upon another, it is incumbent on that other to prove how he came by it; otherwise, the presumption is, that he has taken it feloniously."). And, as the Fourth Circuit also conceded, the inference "has been widely employed . . . in our state and federal courts from earliest times." (Ptn. App. 11). *See, e.g., Commonwealth v. Millard*, 1 Mass. 6 (1804). *See also Wilson v. United States*, 162 U.S. 613, 619-620 (1896).¹⁶

Virginia, of course, is a State with a long and still vibrant common law tradition, *see* Va. Code § 1-10 (Repl. Vol. 1987), and the "recent possession" principle is deeply rooted in our law. "At least since 1872 Virginia juries have been instructed that the defendant's exclusive possession of recently stolen goods, if he offers no reasonable explanation, permits a presumption or inference that the defendant stole the goods." R. Groot, *Criminal Offenses and Defenses in Virginia* 222 (2d ed. 1989), citing *Price v. Commonwealth*, 62 Va. (21 Gratt.) 846, 869 (1872). *See also Carter v. Commonwealth*, 209 Va. 317, 323-324, 163 S.E.2d 589, 594 (1968), *cert. denied*, 394 U.S. 991 (1969); *Bright v.*

¹⁶ The amicus brief that Florida and twenty-four other States filed on Virginia's behalf at the petition stage amply demonstrates that the common law inference retains widespread acceptance: "[T]he vast majority of jurisdictions throughout this country continue to apply this . . . inference." (Florida Amicus Brief at 1).

Commonwealth, 4 Va.App. 248, 251, 356 S.E.2d 443, 444 (1987).

Virginia also recognizes the common law principle that, if an accused thief such as West attempts to explain his possession of the stolen goods, it is solely the jury's province to determine the credibility of the explanation. *See Montgomery v. Commonwealth*, 221 Va. 188, 190, 269 S.E.2d 352, 353 (1980) (jury need not accept the defendant's explanation even if it is "not inherently incredible"). Moreover, as this Court itself held nearly a hundred years ago, if the jury concludes that the defendant has falsely "explained" his possession of the stolen goods, such falsehood may be construed by the jury as affirmative evidence of his guilt. *See Wilson*, 162 U.S. at 620-621 ("Nor can there be any question that, if the jury were satisfied . . . that false statements . . . were made by the defendant . . . they had the right . . . to regard [such statements] . . . as in themselves tending to show guilt."). *See also Speight v. Commonwealth*, 4 Va. App. 83, 88, 354 S.E.2d 95, 98 (1987) (en banc) (false testimony viewed as affirmative evidence of larceny).

According to the Fourth Circuit, a federal court is free to invalidate collaterally a state larceny conviction on sufficiency grounds, so as to bar even the possibility of retrial,¹⁷ simply by disagreeing with the jury's assessment of the defendant's explanation for his possession of the stolen goods and with the jury's drawing of the inference of theft that it was told, without objection, it was free to

¹⁷ *See Burks v. United States*, 437 U.S. 1 (1978).

draw. This Court has made clear, however, that the legitimate interests of finality, comity and federalism cannot be brushed aside so easily. Given the inference's venerable pedigree, the Court of Appeals' collateral evisceration of it in the name of "due process" is indefensible.¹⁸ See *Schad v. Arizona*, 111 S.Ct. 2491, 2507 (1991) (Scalia, J., concurring) ("Unless we are here to invent a Constitution rather than enforce one, it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is 'due.' "); see also *Griffin v. United States*, 112 S.Ct. 466, 470 (1991) ("The historical practice . . . fails to support petitioner's claim under the Due Process Clause. . . .").

B. *The Court of Appeals Violated the Jackson Standard.*

The decision of the Court of Appeals here clearly was not a straightforward application of *Jackson*. Under an unadorned *Jackson* analysis, any reviewing court would conclude, as the district court concluded (Ptn. App.

¹⁸ West's argument that the "recent possession" inference is somehow stronger in cases where the defendant is charged with receiving stolen goods rather than larceny (Br. Op. 6 n.3) misses the point in at least two respects. First, under Virginia law, receiving stolen goods is indictable as larceny and is punishable in exactly the same manner. Va. Code § 18.2-108 (Repl. Vol. 1988). Second, when a jury is instructed without objection, as it was here, that it can infer from the recent, exclusive possession of stolen goods that the defendant "was the thief" (Ptn. App. 4), the strength of the inference, once raised by the evidence, is clearly a matter for the jury, not a reviewing court, to decide.

27-28), that the jury could have reasonably determined that West had lied when he attempted to explain his possession. After all, it could have been perfectly obvious to everyone in the courtroom who saw and heard West testify, as the jury did, that his explanation was false.¹⁹ The Fourth Circuit, however, vacated West's conviction because in *its* subjective judgment "there was nothing inherently implausible about [West's] explanation," his account "could not fairly be treated as positive evidence of guilt" and "was, at most, a neutral factor in assessing the probative force of the inference." (Ptn. App. 18-19, emphasis added).

Rather than faithfully applying *Jackson*, the Court of Appeals just adopted as its own the five-part analysis previously articulated by another court of appeals in *Cosby v. Jones*, 682 F.2d 1373 (11th Cir. 1982). Under this improperly diluted standard, the jury's assessment of credibility is hardly given the "full play" and deference demanded by *Jackson*. Instead, the credibility of the

¹⁹ Thus, the Court of Appeals' conclusion that this is a case where "the *only* evidence of guilt consists of the 'basic facts' of the inference" is clearly erroneous. (Ptn. App. 7, emphasis added). By the time the case reached the jury, the evidence of West's guilt had been significantly enhanced by his performance on the witness stand. His incredible trial testimony "would have required the [jury] to draw a series of improbable inferences from the basic facts," see *Jackson v. Virginia*, 443 U.S. at 325, not the least of which was that he had purchased a large assortment of personal property, all belonging to Mr. Cardova, in one transaction for a sum less than half of the property's value, while at the same time having no explanation for his possession of the victim's television and coffee table. (Ptn. App. 3-4; J.A. 21-29).

defendant's explanation is relegated to merely one facet of the five-part analysis; even then, the "standard" is couched in terms of "[w]hether the explanation given by the defendant, *even if discredited by the jury*, was 'not so implausible or demonstrably false as to give rise to positive evidence in favor of the government.' " (Ptn. App. 15, emphasis added, citation omitted).

In a case such as West's where it is undisputed that the jury was properly instructed regarding the common law inference (Ptn. App. 20) and that the defendant's possession of the stolen goods was both recent and exclusive,²⁰ the jury's resolution of the case necessarily will turn on whether the defendant explains his possession, or if an explanation is made, whether that explanation is credible. After reading West's rather transparent trial testimony (J.A. 19-30), any court reviewing this case under the *Jackson* standard should have conceded that a rational jury could have found West's explanation incredible and that he had lied to conceal his guilt. The Fourth Circuit, however, substituted its own assessment of West's credibility for the jury's, and converted what is actually the

²⁰ The Fourth Circuit conceded that West's possession of the stolen goods was sufficiently "recent" and "exclusive" to warrant an instruction to the jury concerning the inference of theft. (Ptn. App. 14). The court, however, erroneously implied that there was no evidence that the stolen goods were in West's possession until "January 10, 1979." (Ptn. App. 14). West, himself, admitted under oath that he came into possession of the goods "before" January 1, 1979. (J.A. 25, 27). Thus, the evidence showed that Mr. Cardova's property was stolen from his home sometime between December 13 and 26, 1979 (Ptn. App. 2) and was in West's possession within five to eighteen days later.

determinative factor into a merely "neutral" one.²¹ See *United States v. Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991) (Posner, J.) (defendant's false denial of guilt resolves sufficiency issue).

The Fourth Circuit also improperly injected itself into state law matters by concluding that it somehow inured to West's benefit that the stolen goods "were found in 'plain view' in a search of [his] residence" by the police, and that the inference in this case was "weakened" by the fact that West was found in possession of "only" a portion of the goods stolen from the victim's home. (Ptn. App. 16-17). With respect to the former, a thief who stores the fruits of his crime within his home should not be given federal "bonus points" merely because the stolen goods are left within sight of anyone he permits to enter. As to the latter conclusion, under Virginia law it has long been held that a jury "may infer the stealing of the whole from the possession of part." See *Henderson v. Commonwealth*, 215 Va. 811, 813, 213 S.E.2d 782, 784 (1975), quoting *Johnson v. Commonwealth*, 141 Va. 452, 456, 126 S.E. 5, 7

²¹ The "lesson" to be learned from *Jackson* is an "elementary one" that the lower federal courts should "have taken to heart long ago": the mandate of those courts "does not extend to interfering with factfinders in state criminal proceedings or with state courts that are responsibly and consistently interpreting state law, unless that interference is predicated on a violation of the Constitution." See *Godfrey v. Georgia*, 446 U.S. 420, 451 (1980) (White, J., dissenting). Clearly, the Constitution was not implicated by the jury's disbelief of West's testimony and its use of his deliberate falsehood, in accordance with Virginia law, as affirmative evidence of his guilt. See *Brecht*, 944 F.2d at 1369 ("difficulties of inference are subjects for state law").

(1925). Surely, the federal courts have no warrant to determine in a collateral proceeding such minutiae of state law as the portion of a victim's stolen goods that must be found in a defendant's possession before giving rise to the inference of theft. See *Estelle v. McGuire*, 112 S.Ct. at 480 ("it is not the province of a federal habeas court to reexamine state court determinations on state law questions"); *Jackson*, 443 U.S. at 324, n.16 (sufficiency standard must be applied in context of applicable state law).

In sum, the Court of Appeals' decision constitutes an unauthorized alteration of the deferential standard this Court established in *Jackson*. See 443 U.S. at 319 n.13 ("[T]he standard announced today does not permit a court to make its own subjective determination of guilt or innocence."). *Jackson's* guiding principle has only been confirmed and enhanced by the other parallel doctrines circumscribing the scope of federal habeas review. Like the *Teague* and procedural default doctrines, *Jackson's* mandate of deference is premised upon considerations of finality, comity and federalism that cannot be jettisoned merely because a federal court disagrees with the state courts' entirely reasonable resolution of a prisoner's constitutional claim.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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(12)
No. 91-542

Supreme Court, U.S.
FILED
MAR 2 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

ELLIS B. WRIGHT, JR., WARDEN, ET AL.,
Petitioners,
v.

FRANK ROBERT WEST, JR.,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENT

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STATEMENT OF THE CASE

Respondent, Frank West, pled not guilty to a charge that on or about December 13, 1978, in Westmoreland County, Virginia, he feloniously took, stole, and carried away the property of Angelo F. Cardova with a value of \$100 or more in violation of Va. Code Ann. § 18.2-95 (Michie 1975). J.A. 3. The testimony presented at trial indicated that Cardova owned a house in Westmoreland County, Virginia. J.A. 7. On the afternoon of December 13, 1978, Cardova locked and left the house. When he returned to the house on December 26, 1978, he discovered that \$3500 worth of his property was missing. *Id.*

On January 10, 1979, sheriff's personnel searched West's home in Gloucester County, Virginia, and seized numerous items which they identified as reported stolen in Westmoreland County. J.A. 18. West was not at his home when the search was conducted. J.A. 17-18. Some time later in January, Cardova went to the sheriff's office and identified several items seized from West's home as \$1100 worth of the property he previously reported stolen. J.A. 9-13.

The prosecution rested after it presented evidence to establish: (1) West's exclusive possession of the Cardova items found in Gloucester County; and (2) the chain of custody from the time the items were seized to the time they were identified by Cardova. West moved to strike the evidence for failure to prove that he was the "active agent" in the theft but the motion was denied. J.A. 18-19.

West testified that he bought several truckloads worth of merchandise at flea markets and then resold the items at different locations. J.A. 21. He acknowledged that many things bought at flea markets may be stolen, but denied being in Westmoreland County and stealing anything or breaking into any house. *Id.* West recalled purchasing several of the articles in question from Ronnie Elkins, who sold goods at flea markets. West remembered that sometime around January 1, 1979, he gave \$500 to Elkins for all the items he bought. J.A. 23, 26. West

claimed that he was not able to produce Elkins as a witness because he did not know until the day of the trial what items he was charged with taking. J.A. 29.¹

No rebuttal evidence was presented by the prosecution. West renewed the motion to strike, which was denied. J.A. 30. In closing argument to the jury, the defense pressed for acquittal because the prosecutor presented "no direct evidence whatsoever that [West] carried, himself, items out of the [Cardova] house." J.A. 30. The prosecutor, in his closing argument, responded that the jury should reject West's claim of innocence and that the "law in its wisdom in these circumstances allows the jury to draw" the inference that the possessor of recently stolen goods is the thief. Tr. 89-90.²

The jury found West guilty and sentenced him to ten years imprisonment. Tr. 93. He filed a petition for appeal on several grounds, including the sufficiency of the evidence to convict beyond a reasonable doubt. J.A. 38-40. On May 30, 1980, the Supreme Court of Virginia denied the petition, stating only that it found no reversible error. J.A. 41. In 1987, West secured an unsworn "affidavit" from Ronnie Elkins. The affidavit generally corroborated West's testimony that he purchased the Cardova items at flea markets and that many of the Cardova items came to West from Elkins. Pet. App. 21-22 n.9. West again sought relief in the state courts on the basis of the affidavit, the sufficiency of the evidence, and other claims. His petition for a writ of habeas corpus was summarily denied by the Virginia Supreme Court on May 13, 1988. J.A. 48.

West next filed a federal habeas petition pursuant to 28 U.S.C. § 2254 (1982). The district court denied relief. In pertinent part, it applied the standard enunciated by this

¹ West was incarcerated when the items were taken from his house and the indictment did not specify the items that were taken from Cardova. Pet. App. 19.

² "Tr." refers to the trial transcript in *Commonwealth v. West*, dated June 21, 1979. This transcript is part of the original record in this case.

Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), and concluded that a rational juror could find beyond a reasonable doubt that West was guilty of grand larceny. Pet. App. 28.

On appeal, the court of appeals reversed. It rejected threshold claims that the *Jackson* issue was not raised in state court and that relief was, in any event, barred under the "new rule" restriction of *Teague v. Lane*, 489 U.S. 288, 310 (1989). Pet. App. 8-10.

The court of appeals then reached the merits of West's claim that the prosecution had not proved an essential element of the crime with which he was charged, namely, his participation in the Westmoreland County theft that occurred on or about December 13, 1978. It focused on the question of whether the unexplained possession of some of the stolen items, without any evidence linking West to the scene of the theft, was enough evidence to convince any rational juror beyond a reasonable doubt that West committed the theft. Pet. App. 14. The court of appeals acknowledged the existence of the common law rule that possession of stolen goods in these circumstances raises a permissive inference that the possessor is also the thief. Pet. App. 11. Nevertheless, giving due weight to the inference, it concluded that the evidence, even when viewed in the light most favorable to the prosecution, could not convince any rational juror that West was guilty as charged. Pet. App. 20.³

The court of appeals recognized that:

[T]here may be no more delicate constitutional determination in federal collateral review, given its unique rejection not only of state judicial rulings but of state jury findings. Aware of its

³ The United States points out that the writ was granted many years after West was convicted. Br. U.S. 22. Though this is true, no claim of prejudicial delay has ever been raised by the petitioners under Rule 9(a) of the Rules Governing § 2254 Cases. Moreover, West appears to have promptly pressed his request for collateral review after he obtained the "affidavit" from Elkins in 1987.

special delicacy when viewed in this stark way, we nevertheless have felt obliged under the constitutional test we apply to make that determination here.

Pet. App. 20-21. The court emphasized that it was making a case-specific ruling which did not preclude the continued, and presumably frequent, use of the inference in Virginia. *Id.*

SUMMARY OF THE ARGUMENT

1. This case presents a sufficiency-of-the-evidence claim that requires the Court to apply settled legal principles to the facts in order to determine whether respondent's conviction violates due process. Resolution of this case in respondent's favor would not violate the *Teague* retroactivity doctrine. *Teague v. Lane*, 489 U.S. 288 (1989) (plurality). *Teague* is not implicated because habeas review of sufficiency challenges under federal due process standards had already been settled by *Jackson v. Virginia*, 443 U.S. 307 (1979), before respondent's conviction became final in 1980. Equally well settled at that time was the principle that a permissive inference, standing alone, could not sustain a conviction unless the evidence giving rise to it proved each element of the crime beyond a reasonable doubt. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979). Because the court of appeals merely applied these settled principles, its decision did not announce or apply a new rule of law, and the grant of the writ is not barred by *Teague*.

2. Respondent's sufficiency claim is not procedurally defaulted as petitioners suggest. At trial, West repeatedly moved to dismiss the case, arguing that the evidence was insufficient as a matter of law to prove that he was guilty as charged. On appeal, West again argued that Virginia had failed to prove his guilt beyond a reasonable doubt. As petitioners themselves conceded in district court, once West's sufficiency challenge was rejected by the state courts, he had exhausted state court remedies and was eligible to seek *Jackson* relief in a

habeas proceeding. Respondent's direct challenge to the sufficiency of the evidence did not require that he also challenge the constitutionality of the inference instruction.

3. In light of settled due process standards, no rational juror could have found beyond a reasonable doubt that West committed the larceny in Westmoreland County as charged. Virginia prosecuted West exclusively on the theory that he committed the theft; other theories of larceny, such as receiving stolen goods, were not submitted to the jury. The jury had no direct evidence that West participated in the theft. Instead, it was left to rely exclusively upon the common law permissive inference that a person in the unexplained possession of recently stolen property is the thief. Thus, under *Ulster County Court*, this inference had to prove beyond a reasonable doubt that West committed the theft.

Historically, unexplained possession of stolen property, without more, has not necessarily revealed how the possessor obtained the property; the inference flowing from such possession cannot distinguish between those who stole the goods and those who merely received the goods. Therefore, West's possession of stolen items in Gloucester County, standing alone, was inadequate to prove that he stole them in Westmoreland County some two weeks earlier. Nor does the jury's rejection of West's testimony provide additional, much less conclusive, proof that he was the thief.

The decision below does not threaten the continued use of the common law inference by Virginia or any other state. The court of appeals merely held that the circumstances of West's possession of stolen goods, unilluminated by other inculpatory facts, was insufficient to prove guilt of larceny as charged. Because exclusive reliance on the inference to prove guilt is rare, and the ruling below is narrowly tailored to the facts of West's case, the court of appeals' decision is of little importance to other cases where the inference is invoked.

4. In response to the Court's question of whether a habeas court should give deferential or *de novo* review to a state court's application of law to a specific set of facts, respondent suggests three reasons why the answer must be *de novo* review: (1) the controlling statute so provides; (2) the separation of powers doctrine requires Congress to decide whether to alter the existing *de novo* standard; and (3) stare decisis compels this Court to respect forty years of unwavering precedent applying *de novo* review to mixed questions.

In 28 U.S.C. § 2254, Congress provided for a federal remedy for state prisoners who allege they are in custody pursuant to state court judgments in violation of their constitutional rights. The statute provides for plenary review of all but state court factual findings, which are presumptively correct under the terms of § 2254(d).

The separation of powers doctrine grants Congress the prerogative to decide whether alteration of the standard of habeas review is warranted. Past and present activity by Congress demonstrates its consistent interest in retaining control of this fundamental determination. The question whether state convictions will be subject to independent federal review is a political issue which can only be determined by the legislature.

The principles of stare decisis mandate the continued use of the *de novo* standard for mixed questions. At least since *Brown v. Allen*, 344 U.S. 443 (1953), this Court has consistently instructed habeas courts to apply the *de novo* standard when reviewing state courts' constitutional rulings on mixed questions. Of particular significance here, the Court in *Jackson v. Virginia* recognized this standard as appropriate for reviewing sufficiency challenges. Any alteration of the standard of review in this case would derogate from these fundamental principles. There is no compelling reason to redetermine this settled question.

5. Finally, the Court's retroactivity decisions in *Teague*, *Butler v. McKellar*, 494 U.S. 407 (1990), and *Saffle v. Parks*, 494 U.S. 484 (1990), are consistent with the statutory requirement of *de novo* review for mixed questions.

Teague requires habeas courts to refrain from the retroactive application of new rules in order to prevent the disparate treatment of similarly situated defendants. Neither *Teague* nor its progeny diminish the power of the habeas court to conduct plenary review of habeas petitions.

Furthermore, increased deference to state court decisions would be problematic for two reasons. First, the federal courts would face the difficult task of determining how the state court's decisions were reached and whether the decisions are entitled to deference. Second, increased deference to state court decision-making may result in the disparate treatment of similarly situated litigants that *Teague* sought to avoid.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ANNOUNCE OR APPLY A NEW RULE OF CRIMINAL PROCEDURE WHEN IT GRANTED RELIEF.

This Court prohibits the retroactive application of new rules of criminal procedure on habeas review. *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality). New rules are broadly defined in *Teague* as follows:

[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government. . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Id. at 301 (citations omitted).

Later cases have refined this concept. "Dictated by precedent" does not mean that the rule applied by the habeas court is simply within the "logical compass" or "controlled" by existing precedent. *Butler v. McKellar*, 494 U.S. 407, 415 (1990). Rather, the rule applied by the habeas court must be "compelled" by the precedent that existed when the conviction became final in the state

courts. *Sawyer v. Smith*, 110 S. Ct. 2822, 2828 (1990). "The principle announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions [that were] valid when entered." *Sawyer*, 110 S. Ct. at 2827.

The court of appeals did not announce a new rule when it determined that the evidence presented at West's trial could not convince any rational juror beyond a reasonable doubt that Frank West committed a theft in Westmoreland County, Virginia on or about December 13, 1978. Rather, this determination was compelled by the precedent that existed before West's conviction was finalized in 1980.⁴ By the end of 1979, this Court had already established that state convictions were subject to habeas review to determine if the evidence was sufficient to prove guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979) (making sufficiency claims cognizable on habeas review). Other cases made it clear that a state's reliance on a statutory or common law permissive inference as part of its proof did not resolve the separate question of whether the evidence was sufficient. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 165-67 (1979) (recognizing that common law and statutory permissive inferences are "one not necessarily sufficient part of the [prosecution's] proof," and that if no other evidence is presented, evidence giving rise to the inference must establish guilt beyond a reasonable doubt); *Barnes v. United States*, 412 U.S. 837, 843 (1973) (rejecting a due process challenge to a jury instruction

⁴ Respondent here addresses *Teague* as a rule defining retroactive application of law. Respondent discusses petitioners' more sweeping assertion, that *Teague* abolished *de novo* review in habeas proceedings, Br. Pet. 11, *post* p. 44. In light of this assertion, petitioners do not appear to be pressing the *Teague* retroactivity claim they pursued in the court of appeals. Pet. App. 10. They now acknowledge that the ruling by the court of appeals did not announce a new rule regarding the constitutionality of the inference. Br. Pet. 27-28 n.15.

that unexplained possession of recently stolen checks permits inference that possessor knew checks were stolen because evidence giving rise to the inference satisfied the beyond-a-reasonable-doubt standard); *United States v. Gainey*, 380 U.S. 63, 68 (1965) (statutory permissive inference that presence at an illegal still is sufficient to convict under 26 U.S.C. § 5601 does not preclude trial court from granting directed verdict or motion *j.n.o.v.*).⁵

Thus, this Court's precedent as of 1979 compelled the court of appeals to determine whether the evidence presented in this case would permit any rational juror to find respondent guilty beyond a reasonable doubt.⁶ Given the settled state of federal law, the new rule principle did not prohibit a ruling that the evidence in this case was insufficient, even if state law held otherwise. See *Sawyer*, 110 S. Ct. at 2830 ("Federal habeas corpus serves to ensure that state convictions comport with the federal law that was

⁵ These cases are discussed in more detail in argument III of this brief, *post* pp. 16-21.

⁶ The only other circuit to address this type of sufficiency issue, raised on habeas review, recognized that *Ulster County Court* and *Jackson v. Virginia* compelled the type of case-by-case review conducted by the court of appeals in this case. *Cosby v. Jones*, 682 F.2d 1373, 1379-80 (11th Cir. 1982). Several state supreme courts also recognized the significance of *Ulster County Court* for sufficiency claims where the prosecution relied on an inference to prove a necessary element of its case. See, e.g., *Bankston v. State*, 309 S.E.2d 369, 370 (Ga. 1983) (citing *Ulster County Court* and holding that despite the state's long use of the inference, the sole evidence of "recent, unexplained possession is not automatically sufficient to support a conviction for burglary"); *People v. Housby*, 403 N.E.2d 62, 64 (Ill. App. Ct. 1980) (citing *Ulster County Court* and noting that unexplained possession of recently stolen property, without corroborating evidence, is insufficient to convict for burglary), *aff'd*, 420 N.E.2d 151 (Ill.), *cert. denied*, 454 U.S. 845 (1981); *Bellamy v. State*, 742 S.W.2d 677, 682, 684-85 (Tex. Crim. App. 1987) (citing *Ulster County Court* and holding that although the failure of a second-hand dealer to record a purchase of goods is "admissible, tending to show appellant was aware he was dealing in stolen goods," where "nothing in the facts [existed] . . . to shore up the particular inference . . .," the inference was unconstitutional as applied to the appellant).

established at the time the petitioner's conviction became final.").

Nor does application of settled principles to a new set of facts, as was done here, violate *Teague*.⁷ West is entitled to application of the settled rule that due process requires case-by-case review to determine whether the state proved each element of the crime beyond a reasonable doubt. As the court of appeals noted:

Obviously, a federal habeas court cannot be said to apply a "new constitutional rule" whenever it applies the *Jackson v. Virginia* test to a "new" set of facts in evidence.

Pet. App. 10.⁸

II. THE JACKSON v. VIRGINIA SUFFICIENCY ISSUE WAS NOT PROCEDURALLY DEFAULTED IN THE VIRGINIA COURTS.

Petitioners insist the sufficiency issue was procedurally defaulted because West did not challenge the vitality of the inference in state court. Br. Pet. 27. This claim is incorrect. West repeatedly objected that the evidence was insufficient to prove he was the thief. Pet.

⁷ *Yates v. Aiken*, 484 U.S. 211, 216 (1988) ("many 'new' holdings are merely applications of principles that were well settled at the time of conviction"); see also *Francis v. Franklin*, 471 U.S. 307, 326 (1985) (applying principle that governed earlier decision). Lower federal courts have recently concluded that decisions from this Court may be applications of settled precedent and not new rules. See, e.g., *Harris v. Vasquez*, 949 F.2d 1497, 1512 (9th Cir. 1990) (holding that *McCleskey v. Zant*, 111 S. Ct. 1454 (1991) defined the doctrine of abuse of the writ with more precision than before but was not a new rule), petition for cert. filed, No. 91-6990 (Jan. 14, 1992).

⁸ It is clear that the court of appeals was concerned with its responsibility to impose no new obligation on the Commonwealth of Virginia. Pet. App. 21. The court therefore did not announce any new rule regarding the continued use of the inference: "we hold only that the specific evidence used to invoke the inference of guilt *here* failed to meet the beyond-a-reasonable-doubt test of *Jackson v. Virginia*." Pet. App. 21 (footnote omitted) (emphasis added).

App. 5. Though West made no objection to the common law inference instruction, the court of appeals agreed that "[t]hroughout, his challenge has been to the sufficiency of the evidence to take the case to the jury under any jury instructions." Pet. App. 7. West's state court claim, once rejected, exhausted the state remedies available to test the sufficiency of the evidence. The court of appeals thus concluded that West was entitled to bring his due process claim in a federal habeas action. Pet. App. 8-9.⁹

The court of appeals' analysis is undoubtedly correct. First, when West's counsel moved to strike the evidence at the close of the state's case, he stated:

I have heard no evidence whatsoever to show that Frank West was the person who collected these items and carried them off. There have been no witnesses, no single bit of evidence presented as to him taking the stuff off the premises of Mr. Cardova.

The larceny has not been shown, because he has not been shown to be the active agent that did this.

J.A. 19. The motion to strike was renewed at the close of the defense, J.A. 30, repeated to the jury in closing argument, J.A. 30-31, and renewed again after the verdict was returned. J.A. 36.

On appeal, West again claimed that Virginia did not prove his guilt beyond a reasonable doubt, stressing that "there is not one shred of evidence which places the defendant anywhere near the scene of the alleged crime." J.A. 40. West then directly challenged the adequacy of the inference to prove guilt *in this case*: "Because there was no other evidence at all to connect the defendant to the crime, we suggest that a rebutted inference of guilt is not

⁹ The United States is wrong to suggest that respondent recast his claim as a sufficiency challenge to avoid *Teague* problems that would have been occasioned by a more direct challenge to the common law inference. Br. U.S. 17. West has consistently confined his challenge to the sufficiency of the evidence to convict him in this case.

sufficient to meet the standard of proof required of the Commonwealth, that a reasonable doubt must certainly exist. . . . " *Id.*¹⁰ Thus, West challenged the sufficiency of the evidence to prove a necessary element of the crime charged, and this Court in *Jackson* recognized that such a challenge raised a federal claim:

Under the *Winship* decision, it is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim.

Jackson, 443 U.S. at 321.

Finally, the petitioners conceded in district court that respondent's claim concerning sufficiency of the evidence was exhausted; they defended in district court on the basis that a rational juror could have found that West was guilty of larceny. J.A. 52-54. That concession precludes invocation of procedural default on appeal.¹¹

¹⁰ As petitioners note, West did claim on appeal that his testimony rebutted the inference. That claim, however, did not alter or diminish his oft-repeated argument that the evidence presented did not establish his guilt of the crime charged beyond a reasonable doubt. Indeed, West moved to strike the evidence even before he testified, claiming that the inference from unexplained possession was inadequate to allow the case to proceed any further. J.A. 18-19. When fairly read, West's state court claims include the issue raised in the district court, the court of appeals and here. The court of appeals properly relied on *Picard v. Connor*, 404 U.S. 270, 278 (1971) ("substance of a federal habeas corpus claim must first be presented to the state courts"), for the proposition that West was not required to cite "book and verse on the federal constitution." Pet. App. 9. See also *Hawkins v. West*, 706 F.2d 437, 439 (2d Cir. 1983) (defendant's allegation that "[t]he prosecution's case fell quite short of that required to prove appellant's guilt beyond a reasonable doubt" properly alerted the state court to a due process right guaranteed by the federal Constitution).

¹¹ See *Reese v. Nix*, 942 F.2d 1276, 1280 (8th Cir. 1991) (upholding district court ruling that warden waived procedural defense because he failed to affirmatively assert it in his answer to the habeas petition), *cert. denied*, 1991 WL 284583 (Feb. 24, 1992).

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III. NO RATIONAL JUROR COULD FIND BEYOND A REASONABLE DOUBT THAT WEST COMMITTED THE CRIME WITH WHICH HE WAS CHARGED, AND THE COURT OF APPEALS WAS COMPELLED TO GRANT HABEAS RELIEF UNDER *JACKSON v. VIRGINIA*.

A. *Virginia Relied on the Common Law Inference Arising from the Unexplained Possession of Recently Stolen Goods to Prove that West Committed a Theft Weeks Earlier in Another County of Virginia.*

The sufficiency analysis of *Jackson v. Virginia*, 443 U.S. 307, 319, 324 n.16 (1979), requires the habeas court to determine whether any rational juror could find beyond a reasonable doubt the elements of the crime charged as defined by state law. In this case, respondent was charged by indictment as follows:

Frank Robert West, Jr., on or about the 13th day of December, in the year of one thousand nine hundred and seventy-eight, and in [Westmoreland] County, did feloniously . . . take, steal, and carry away the property of Angelo F. Cordova [sic] having a value of \$100 or more, in violation of Section 18.2-95 of the Code of Virginia of 1950. . . .¹²

J.A. 3.

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A finding of a waiver of the default claim is not inconsistent with *Granberry v. Greer*, 481 U.S. 129 (1987). There, this Court held that an exhaustion claim could be raised by the state for the first time on appeal and the court of appeals could decide whether to proceed by balancing the competing interests of the parties. Here, however, exhaustion was raised for the first time in the district court when it was conceded by petitioners. Petitioners should be held to that concession.

¹² Section 18.2-95, in pertinent part, defines grand larceny generally – "Any person who . . . [c]ommits simple larceny not from the person of another of goods and chattels of the value of \$200 or more, shall be deemed guilty of grand larceny" – and sets forth the punishment. Va.

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Though Virginia could have requested an instruction on the lesser included offense of larceny by receiving stolen goods, *Cablier v. Commonwealth*, 184 S.E.2d 781, 783-84 (Va. 1971) (receiving stolen goods is a lesser included offense of larceny and chargeable as larceny), *cert. denied*, 405 U.S. 1073 (1972), such an instruction was not given to the jury.¹³ Rather, the trial court instructed the jury to convict "[i]f you believe from the evidence beyond a reasonable doubt that [West] took and carried away . . . the property of Angelo F. Cordova [sic], as charged in the indictment. . . ." J.A. 33. Thus, Virginia committed itself to proving beyond a reasonable doubt that West was a participant in the Westmoreland County theft.¹⁴ See *Mitchell v. Commonwealth*, 127 S.E. 368, 374 (Va. 1925) ("The offense as charged must be proved.").

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Code Ann. § 18.2-95 (Michie 1988). Although regulated by statute, grand larceny is a common law crime in Virginia. *Smith v. Cox*, 435 F.2d 453, 457 (4th Cir. 1970), *vacated on other grounds*, 404 U.S. 53 (1971). Virginia courts define it as "the wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently." *Skeeter v. Commonwealth*, 232 S.E.2d 756, 758 (Va. 1977).

¹³ Receiving stolen goods is separately defined under Va. Code Ann. § 18.2-108 (Michie 1988), which provides: "If any person buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted."

¹⁴ This point was undisputed at trial. In closing argument, defense counsel noted:

I have not heard [anyone] testify, nor can they say it was Frank West I saw in the house or it was Frank West I saw come out of the house with the goods. There has been no such testimony, and when you, ladies and gentlemen of the jury, read the elements of the offense as charged in the Bill of Indictment, and you weigh the evidence before you, I believe that it has not been shown beyond any reasonable doubt that [West] was

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At trial, the prosecution presented no evidence which placed West in Westmoreland County or at the Cardova house at any time. Nor was any other link between West and Cardova or Westmoreland County established. Instead, the prosecution relied exclusively upon Virginia's common law inference that one in the possession of recently stolen property is himself the thief, unless he explains his possession to the satisfaction of the jury.¹⁵ The bare facts giving rise to this permissive inference comprised the only evidence presented against West to prove the charge: namely, (1) the fact that certain property, valued at \$3500, was stolen from the Cardova house in Westmoreland County between December 13 and December 26, 1978 (J.A. 6-16); (2) some of the stolen items, valued at \$1100, were discovered in West's exclusive possession in Gloucester County on January 10, 1979 (J.A. 16-19);¹⁶ and (3) West's possession was unexplained

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the one that went into that house and who carried the goods away.

Tr. 88. The prosecutor did not dispute the lack of direct evidence. He argued, however, that "it is precisely [because] of the problems that [defense counsel] has cited" that the law holds a defendant's unexplained or falsely denied possession of recently stolen goods "sufficient to raise an inference that the defendant was the thief." Tr. 89.

¹⁵ In Virginia, the unexplained possession of recently stolen property may also give rise to an inference of receiving stolen goods with guilty knowledge, *Westcott v. Commonwealth*, 216 S.E.2d 60, 64 (Va. 1975), and, in certain circumstances, burglary, *Sullivan v. Commonwealth*, 169 S.E.2d 577, 579 (Va. 1969), *cert. denied*, 397 U.S. 998 (1970). The court of appeals noted the distinction between the inference of guilty knowledge and the weaker inference of participation in the theft which was relevant to this case. Pet. App. 12-13 n.5.

¹⁶ For the first time in their brief on the merits, petitioners rely on West's testimony that he purchased the items "around January 1," J.A. 26, for the purpose of fixing the date of his acquisition of the goods. Br. Pet. 36 n.20. This testimony, however, does not conflict with the court of appeals' conclusion that "the theft from the Cardova's residence occurred sometime during a period of two to four weeks before some of the stolen items were

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in that the jury chose to disbelieve his account of acquiring the items. (J.A. 20-30).

The question for the court of appeals, in conducting the *Jackson* sufficiency analysis on habeas review, was whether this evidence, viewed in the light most favorable to the prosecution, could persuade any rational juror beyond a reasonable doubt that West participated in the Westmoreland County theft. The court of appeals found that it could not. Pet. App. 20.

B. Under Federal Due Process Standards, the Inference Arising from Unexplained Possession of Recently Stolen Property Cannot be Deemed Sufficient to Prove Guilt Without a Consideration of the Underlying Facts Giving Rise to the Inference.

Petitioners assert, for sufficiency-review purposes, an absolute right to rely upon the long-standing common law inference as proof of theft beyond a reasonable doubt without any examination of the facts giving rise to the inference in a particular case.¹⁷ Br. Pet. 10, 35-37. Under

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found in West's possession" on January 10. Pet. App. 16 (emphasis added). Nor does this testimony affect the court of appeals' analysis. At best, Virginia established that the theft occurred no earlier than December 13 and West's possession commenced no later than "around January 1," some 19 days later. Thus, even accepting the January 1 date of acquisition, the evidence establishes no better than a 19-day span between the theft and West's possession. Petitioners attempt to shorten the time frame by referring to the day Cardova discovered the theft. This analysis is incorrect. That Cardova returned to his house on December 26 and discovered the theft does not fix the date of the crime any closer to the time West came into possession of the goods.

¹⁷ Virginia courts also do not conduct a case-by-case assessment of the facts for determining the "recency" of a defendant's possession. Although Virginia recognizes that "recency" is a question of fact for the jury, Virginia courts have generally held that periods of up to three months are not too long to preclude a finding of recency as a matter of law, without engaging in an analysis of the facts of the particular case. See, e.g.,

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Virginia law, and in petitioners' understanding, a defendant's possession of recently stolen property, if unexplained or falsely denied, is always legally sufficient to support his conviction for theft. See, e.g., *Montgomery v. Commonwealth*, 269 S.E.2d 352, 353 (Va. 1980) ("Absent a credible, exculpatory explanation for defendant's possession of the stolen goods, the judge permissibly inferred that defendant had committed the larceny."). It was on the basis of this rule that the state courts and federal district court affirmed West's conviction. See Br. Pet. 7, 28-29; Pet. App. 27-28. Federal due process analysis, however, has long required a more focused review of sufficiency claims, based on the elements of the crime charged as defined by state law.

It is well settled now, as it was at the time this case was prosecuted in Virginia, that the Fourteenth Amendment requires the prosecution to prove its case beyond a reasonable doubt. In *In re Winship*, 397 U.S. 358, 364 (1970), this Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In *Patterson v. New York*, 432 U.S. 197, 210 (1977), the Court clarified the elements or facts to which the reasonable-doubt requirement applies: "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the non-existence of all affirmative defenses [is] never constitutionally . . . required."

Having thus established the reasonable-doubt standard as the measure of the prosecution's ultimate burden

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Montgomery v. Commonwealth, 269 S.E.2d 352, 353 (Va. 1980) ("Four weeks is not, as a matter of law, so long a time that goods may not be considered recently stolen."); *Sullivan v. Commonwealth*, 169 S.E.2d 577, 579 (Va. 1970) (two and one-half months); *Wilborne v. Commonwealth*, 28 S.E.2d 1, 2 (Va. 1943) (three months).

of proof at trial, the Court announced in *Jackson v. Virginia*, 443 U.S. 307 (1979), the test for evaluating the prosecution's compliance with that standard on habeas review. In *Jackson*, the Court rejected the "no evidence" rule of *Thompson v. City of Louisville*, 362 U.S. 199 (1960), as an "inadequate" guide for a federal habeas corpus court to use in assessing a state prisoner's sufficiency challenge. *Jackson*, 443 U.S. at 320. The Court reasoned that the *Winship* doctrine, "establishing so fundamental a substantive constitutional standard[,] must also require that the factfinder will rationally apply that standard to the facts in evidence." *Jackson*, 443 U.S. at 317. Noting that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt," *id.*, the Court announced the analysis by which federal courts on habeas review are to ensure that the constitutional standard of *Winship* is rationally applied: "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319. The *Jackson* analysis is to be "applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n.16.

The due process requirements enunciated in *Winship* and *Jackson* apply with equal force in cases where the state relies upon a permissive inference. In *Barnes v. United States*, 412 U.S. 837 (1973), the Court upheld an instruction which permitted the jury to infer guilty knowledge from the possession of recently stolen checks. Although the Court upheld the instruction, it noted that the burden of proving the essential element of guilty knowledge remained with the government. *Id.* at 845 n.9.

In *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 165-67 (1979), a habeas corpus case, the Court held that an instruction on the use of a common law or statutory permissive inference is consistent with due process so long as the inference satisfies the more-

likely-than-not rationality test of *Leary v. United States*, 395 U.S. 6 (1969). That is, the instruction will be upheld if there is a rational connection between the basic facts that the prosecution proves and the ultimate fact presumed, and the latter is more likely than not to flow from the former. *Ulster County Court*, 442 U.S. at 165-67. The Court explained that the "more likely than not" test is appropriate for assessing the constitutionality of allowing the jury to draw the permissive inference because the inference serves as just "one *not necessarily sufficient* part of [the prosecution's] proof" and the "prosecution may rely on *all* the evidence in the record to meet the reasonable-doubt standard." *Id.* at 166-67 (emphasis added). "As long as it is clear that the presumption is *not the sole and sufficient basis* for a finding of guilt, it need only satisfy the test described in *Leary*." *Id.* at 167 (emphasis added). If the permissive inference constitutes the only basis for a finding of guilt, then presumably it must, in and of itself, establish that guilt beyond a reasonable doubt.

The *Ulster* Court recognized the distinction between the standard for allowing a permissive inference instruction at all and the independent question of whether the evidence, including the inference, was sufficient to convict. It held, in the case before it, that the permissive inference satisfied the more-likely-than-not test for purposes of a jury instruction, and it left undisturbed the separate finding by the state court that the evidence as a whole was sufficient to sustain the conviction. *Id.* at 167.¹⁸

¹⁸ The Court had recognized a similar point in *United States v. Gainey*, 380 U.S. 63 (1965), where it noted the distinction between the question of whether the permissive inference could be drawn and the independent question of whether the evidence was sufficient to convict. *Id.* at 68. ("But where the only evidence is [the bare facts giving rise to the inference,] the statut[ory inference] does not require the judge to submit the case to the jury, nor does it preclude the grant of a judgment notwithstanding the verdict. And the Court of Appeals may still review the trial judge's denial of motions for a directed verdict or for a judgment n.o.v.").

Of course, two weeks later in *Jackson v. Virginia*, the Court recognized the constitutional significance of the sufficiency question.

Petitioners seek to circumvent the federal constitutional standard by arguing that *Jackson* requires the habeas sufficiency inquiry to be gauged in light of applicable state law, which petitioners, in turn, define as Virginia's rule that the common law inference, when drawn by the jury, is legally sufficient to sustain a conviction of theft. Br. Pet. 31. *Jackson* considers state law controlling only to the extent that it defines the substantive elements of the crime. 443 U.S. at 324 n.16 ("[T]he standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law."). Under *Jackson*, however, the habeas court must still independently assess the sufficiency of the evidence. Virginia's rule that the inference arising from the possession of recently stolen property is necessarily and always sufficient to prove guilt of theft beyond a reasonable doubt is inadequate for measuring a due process claim under *Winship*, *Jackson*, and *Ulster County Court*.¹⁹

Thus, it is clear that the court of appeals applied the correct standard to test the sufficiency of the evidence to sustain West's conviction. It assumed that the inference of theft arising from the unexplained possession of recently stolen property satisfies the more-likely-than-not rationality test required for an instruction on the inference. Pet. App. 12. It noted, however, that in this case the bare facts giving rise to the permissive inference served as the sole basis for finding West guilty. *Id.* at 4, 7. Under *Ulster County Court*, this meant that the permissive inference, standing alone, had to prove West's guilt of participation

¹⁹ Petitioners' claim that Virginia uses a more permissive review standard than that required by *Jackson*, Br. Pet. 26 n.14, ignores the effect of its law regarding the common law inference. If Virginia courts find the evidence to be sufficient, perforce, in every case in which the jury rejects the defendant's explanation and draws the inference, then Virginia has, in effect, no sufficiency review.

in the Westmoreland County theft beyond a reasonable doubt. *Id.* at 7-8. It was this issue which the court of appeals addressed independently of Virginia's rule that the inference proves guilt in all cases.

C. *The Evidence Presented at Trial Does Not Prove that West Participated in the Westmoreland County Theft.*

1. *The inference arising in this case from West's unexplained possession of recently stolen goods does not establish participation.*

The factual issue in this case is whether Virginia proved that West participated in the December theft in Westmoreland County. The inference arising from the unexplained possession of recently stolen property, which Virginia used to prove this element of participation, does not necessarily identify the nature of the possessor's guilt, *i.e.*, whether the possessor in fact stole the goods or received them with guilty knowledge. Thus, the inference, when understood in the context of its historical development, does not support Virginia's reliance upon it to prove the charge that it brought against respondent.

Traced to its origins, the unexplained possession of recently stolen property served as the basis for two different inferences: the inference that the defendant stole the property and the inference that he received the property with knowledge that it was stolen. The historical development of this "dual inference" is exhaustively traced by the Eighth Circuit in *United States v. Jones*, 418 F.2d 818 (8th Cir. 1969). As that court explained, "these inferences arose at common law because of the similar characteristics of the crimes of larceny and that of receiving stolen merchandise." *Id.* at 824 n.9.

Because the crimes of theft and receiving stolen goods were generally considered to be the same offense, many courts simply did not distinguish between the two inferences and permitted defendants to be convicted of

theft on the basis of evidence which pointed with equal force to the crime of receiving stolen goods with guilty knowledge. *Id.*; see also cases cited therein, e.g., *Kasle v. United States*, 233 F. 878, 888 (6th Cir. 1916) ("[W]here . . . the statute so defines the act of receiving stolen property and that of stealing it as in effect to make the two offenses the same in character . . . the receipt may amount to larceny, as well as the theft; and so the same presumption arising from recent possession that would be applicable to the thief might also be to the receiver."); *Cook v. State*, 1 S.W. 254, 255 (Tenn. 1886) ("it is often difficult to determine precisely whether a party has been guilty of the larceny of the goods, or of feloniously receiving them, where there is no doubt of his guilt of either one or the other offense, and the whole case ought to be left to the jury upon proper instructions as to each").

At least by the end of the nineteenth century, several courts and commentators observed that the inference alone could not accurately distinguish between a thief and a receiver. As Burrill noted:

The recent possession of stolen property may sometimes be referable, not to the crime of theft, but to another, though kindred offence, – that of having *received* the property with a guilty *knowledge* of its having been stolen. And, in the opinion of an able writer, there can be little doubt that persons have frequently been convicted and punished for the former offence, whose guilt consisted in the latter: a consequence which he attributes to the circumstance that real evidence, (or evidence derived from physical facts,) while truly indicative of guilt in general, may be fallacious as to the species and quality of the crime. In order to avoid the chances of such mistakes, it was suggested by the same writer, that counts for larceny should be joined with counts for receiving the goods, in the same indictment; and this practice has since become established both in England and in the United States.

Alexander Burrill, *A Treatise on the Nature, Principles and Rules of Circumstantial Evidence* 456-57 (1868) (citing W.M. Best, *A Treatise on Presumptions of Law and Fact* § 227 (1845)); see also *Reg. v. Langmead*, 10 L.T.R. (N.S.) 351 (1864) (recent possession of stolen property is evidence, either that the person in possession stole the property, or that he received it knowing it to be stolen, according to the other circumstances of the case); William Wills, *An Essay on the Principles of Circumstantial Evidence* 60 (5th Am. ed. 1872) ("The difficulty of referring the act of possession specifically to [either theft or receiving] frequently led to the failure of justice. . . .").

Where the crime of larceny was charged under theories of both larceny by theft and larceny by receiving, this failure to distinguish between the two inferences was of little practical or legal significance. See *Griffin v. United States*, 112 S. Ct. 466, 469-70 (1991) (a general verdict will support the conviction of a crime charged in the conjunctive if the evidence supports any theory of culpability that is submitted to the jury). The distinction between the inferences would be significant, however, if the prosecution proceeded on the single theory that the defendant participated in the theft. As the Supreme Court of North Carolina, in reviewing a petit larceny conviction, warned:

But it is obvious that presumptions of this kind, which even in the strongest cases are to be warily drawn, want one of the indispensable premises to warrant them, when the possession from which a *guilty taking* is inferred does not show a *taking* or *privity in taking* on the part of the possessor . . . [and] unless there be other facts and circumstances to warrant the inference, such a presumption [of guilt of the taking] would be rash and irrational.

State v. Smith, 24 N.C. (2 Ired.) 402, 408-09 (1842).

The difficulty of determining the nature of a defendant's guilt from the simple fact of his unexplained possession of the fruits of a recent crime was perhaps best articulated by then-Judge Cardozo, writing for the New York Court of Appeals in *People v. Galbo*, 112 N.E. 1041

(N.Y. 1916). Assessing a sufficiency challenge to a second degree murder conviction, Cardozo noted that the jury in that case was entitled to find from the evidence that the defendant had possession of the victim's body, threw that body into a ravine to hide it, and falsely denied his actions. *Id.* at 1043. While the defendant's possession and concealment of the body undoubtedly justified "the inference that in some way and at some stage he became connected with this crime[,] . . . the question remain[ed]: In what way and at what stage?" *Id.*

Judge Cardozo explained the problem in the context of the two inferences arising from the unexplained possession of recently stolen goods:

Only half of the problem, however, has been solved when guilty possession fixes the identity of the offender. There remains the question of the nature of his offense. Here again the facts must shape the inference. Is the guilty possessor the thief, or is he a receiver of stolen goods? Judges have said that if nothing more is shown, we may take him to be the thief. But as soon as evidence is offered that the theft was committed by some one else, the inference changes and he becomes a receiver of stolen goods. Sometimes the circumstances make it proper for a jury to say which inference is the true one. Learned commentators have said that in many cases the wrong inference has been drawn. *Men whose guilt was that they had received stolen property have been convicted of stealing it themselves.*

Id. at 1044 (citations omitted) (emphasis added).

Judge Cardozo acknowledged that the inference of guilt arising from the unexplained possession of the fruits of a recent crime was well-settled doctrine. *Id.* at 1044. He cautioned, however, that the sufficiency of that inference to sustain a conviction in any particular case depends upon the crime charged and all of the circumstances disclosed by the evidence. If a defendant's possession gives rise to an inference that he is guilty either as a

principal or an accessory, then "unless other circumstances are shown there is no principle of selection, aside from the presumption of innocence, to guide the choice between them," *id.*, and the factfinder "must give the defendant the benefit of the conclusion that would mitigate his guilt." *Id.*

The court then held that the inference of guilt arising from defendant's falsely explained possession and concealment of the victim's body, unsupported by any additional evidence, would have been sufficient to convict the defendant as an accessory to murder, if he had been indicted and prosecuted as such. That same evidence was simply not sufficient, however, to prove beyond a reasonable doubt that the defendant was the principal as charged. *Id.* at 1045. "In connecting him as a principal, conjecture has filled the gaps left open by the evidence, and the presumption of innocence has yielded to a presumption of guilt." *Id.*

The Eighth Circuit in *United States v. Jones*, 418 F.2d 818 (8th Cir. 1969), reached a similar conclusion under a different set of facts. In that case, the appellant had been convicted of armed robbery on the basis of his possession of bills which matched the serial numbers on "bait money" taken during a bank robbery one day earlier. *Id.* at 819. In assessing the appellant's sufficiency claim, the court noted that two alternative inferences could be drawn from his unexplained possession of the bills: (1) that appellant was guilty of knowingly possessing stolen property, or (2) that he was guilty of the robbery itself. *Id.* at 823. The court explained that when one inference is as consistent as another, "there exists a compelling evidential need for corroboration of the inference charged." *Id.* at 824. Otherwise, the "jury is actually asked to speculate which crime took place from facts which inferentially are said to support both." *Id.*

The court also observed that:

Where the government's evidence is equally as strong to infer innocence of the crime charged, as it is to infer guilt, we are not dealing in the

realm of credibility, but legal sufficiency and a court has the duty to direct an acquittal.

Id. at 826.²⁰

Thus, the inference, when properly understood, cannot be sufficient to sustain West's conviction. His unexplained possession of a portion of the stolen items, some two weeks after the theft in Westmoreland County, could not prove beyond a reasonable doubt that West participated in that theft. Without additional corroborative evidence to link West with the theft,²¹ the jury was forced to speculate as to West's guilt of the crime charged.

2. *The jury's failure to credit West's testimony does not establish participation.*

Petitioners claim that the jury's rejection of West's testimony in this case should be construed as additional, indeed conclusive, proof of guilt. Br. Pet. 33, 35-37; Br. U.S. 23. If the jury rejects a defendant's explanation, then according to petitioners, evidence of possession of recently stolen property is necessarily sufficient to prove that the defendant was the thief. Br. Pet. 36. In petitioners' view, when the court of appeals vacated West's conviction, despite the jury's disbelief of his testimony, it (1) impermissibly supplanted the jury's credibility determination with its own subjective judgment, Br. Pet. 33, and (2) diluted the *Jackson* standard by relegating the

²⁰ Then-Judge Blackmun dissented because, in his view, the inculpatory evidence presented by the prosecution was considerably more than the bare facts giving rise to the inference from unexplained possession of recently stolen money. *Jones*, 418 F.2d at 828 (Blackmun, J., dissenting).

²¹ If, for example, the prosecution had presented the sort of evidence which the court of appeals noted was absent from the record – e.g., "fingerprints or footprints, sightings in the vicinity, other tracings of presence, or . . . [physical indicia] at the site of discovered possession . . . such as soil samples or the like, suggesting West's presence at the theft site" Pet. App. 14 – then the inference arising from West's unexplained possession of the stolen goods could have pointed to his guilt of larceny by participation in the theft.

credibility of the defendant's explanation to merely one factor among many. Br. Pet. 35-37. In fact, it did neither. Petitioners' argument is premised on a mischaracterization of *Jackson*.

Under the petitioners' construction of *Jackson*, a reviewing court must not only defer to the jury's disbelief of the defendant's testimony, but must necessarily imbue that discredited testimony with independent probative weight to prove all elements of the crime. This analysis fails to distinguish between the factual question of whether a defendant's possession is satisfactorily explained and the sufficiency question of whether unexplained possession, alone or in combination with other evidence, proves the necessary elements of the crime beyond a reasonable doubt.

Under *Jackson*, a jury's rejection of the defendant's explanation of his possession of stolen goods is a credibility determination which the habeas court must accept as part of its obligation to view the evidence in the prosecution's favor. *Jackson*, 443 U.S. at 319, 326. The court of appeals did, in fact, accept that credibility determination, as evidenced by its treatment of the case as one involving *unexplained* possession of recently stolen property, to which the common law inference applies. Pet. App. 17. To the extent the court below analyzed West's explanation at all, it simply inquired – out of respect for Virginia's right to have the evidence viewed in its favor – as to whether the explanation shed any additional light on the nature of West's guilt or made it any more likely that he was the thief. The court found that it did not. Pet. App. 19.

Thus, the court of appeals did not overturn the jury's determination that West's possession of the goods was unexplained or falsely denied. What the court of appeals *did* overturn was the jury's conclusion, urged by Virginia law and the petitioners' theory of the case, that West's unexplained possession of the goods proved his guilt of the Westmoreland County theft beyond a reasonable doubt. That conclusion, of course, was not a credibility determination made by the factfinder which a habeas

court was obliged to accept; rather, it was a sufficiency determination which is subject to independent review under the constitutional standard of *Jackson*.²² See discussion *post* pp. 40-41.

Nor can the petitioners bolster their argument by construing West's testimony as additional evidence of guilt which lends probative weight to the inference. The inference arising from a defendant's *unexplained* possession of recently stolen property and the jury's rejection of his explanation of that possession are not independent or separable items of evidence: it is the "[a]bsen[ce of] a credible, exculpatory explanation for defendant's possession of the stolen goods" which allows the inference to be drawn in the first place. *Montgomery*, 269 S.E.2d at 353. Under Virginia law, proof that a defendant possesses recently stolen property constitutes *prima facie* evidence that the defendant is guilty of either receiving stolen goods, theft, or breaking and entering, depending on the case and the particular offense charged; such possession casts upon the defendant the burden of going forward with evidence in justification of his possession. *Brown v. Commonwealth*, 195 S.E.2d 703, 705 (Va. 1973). If the defendant either fails to go forward with any explanation at all or offers an explanation which is rejected by the jury, then, and only then, does the inference of guilt become available to the jury. *Id.*

Thus, petitioners are bootstrapping when they argue that the jury's disbelief of West's explanation can be construed as positive and independent proof that West was the thief. The jury's rejection of West's testimony

²² Petitioners' suggestion that the credibility of a defendant's explanation is "the determinative factor," Br. Pet. 36-37, to which the federal court conducting the *Jackson* sufficiency review must defer, Br. Pet. 37, does not withstand analysis. The jury's rejection of a defendant's testimony is not "all purpose" evidence of each and every element of the offense charged. If it were "all purpose" evidence of guilt, there would be no *Jackson* sufficiency review in cases where the defendant testified. Such a drastic limitation on *Jackson* ignores the fundamental due process values that *Jackson* was designed to protect and finds no support in any authority.

added no probative force to the common law inference; it merely permitted an inference of guilt to be drawn.

More importantly, while West's testimony may have suggested to a rational juror that West was lying and thus, guilty of being connected with the crime in some way and at some stage, it did not, and could not, advance the prosecution's case by the additional step of placing West at the Cardova house in Westmoreland County in December of 1978. As Judge Cardozo noted in *Galbo*: "That the defendant has lied about the crime does not prove that he must have been implicated as a principal [as opposed to an accessory]. There is a motive to falsify whatever the degree of the connection [with the crime]." 112 N.E. at 1045. While West's testimony, if disbelieved, may have lent probative force to an inference of guilty knowledge,²³ it did nothing to further the proof that he was the person who committed the theft.

Petitioners' reliance on the jury's rejection of West's testimony as additional or conclusive evidence of guilt is not supported by the authority they cite. While petitioners correctly note that the Court in *Wilson v. United States*, 162 U.S. 613, 620-21 (1896), found that a defendant's false statements may be regarded as "themselves tending to show guilt" and thus considered along with "all other circumstances of the case" to determine whether the defendant is guilty of the offense charged, the *Wilson* Court did not hold those statements to be either necessary or sufficient, in themselves, to prove his guilt beyond a reasonable doubt. It had no reason to even consider such an issue because the corroborative evidence pointed overwhelmingly to the conclusion that

²³ Indeed, West's testimony - e.g., that he purchased most of the items for the low price of \$500 (J.A. 23), that he frequently bought and sold items at flea markets (J.A. 21), that many flea market goods are of questionable origin (J.A. 21), and that he could not remember the exact dates of his purchases (J.A. 25-27), or the specific items involved (J.A. 23, 27) - if not credible, provided support only for the proposition that he had received the goods with knowledge that they were stolen.

Wilson committed the murder. *Id.* at 614-16. Nor did the *Wilson* Court address the problem identified in *Galbo* of defining the nature and degree of a defendant's culpability from his disbelieved testimony when no other evidence has been presented beyond his unexplained possession of the fruits of a recent crime. *Wilson* does not stand for the proposition that a jury's rejection of the defendant's testimony can serve as positive, much less substantial, proof of the necessary elements of the offense in such cases.

The other cases cited by petitioners and amici are equally unsupportive of their position. For instance, *United States v. Restrepo-Contreras*, 942 F.2d 96 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 955 (1992), cited at Br. U.S. 23, is inapposite. In that case, the court held that discredited testimony claiming unknowing possession of drugs can lend probative force to an inference of guilty knowledge. *Id.* at 99. *Restrepo-Contreras* does not suggest, however, that the jury could also infer the manner in which defendant came to possess the drugs.

To the extent petitioners rely on the line of cases starting with *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952) (L. Hand, J.), which allow a reviewing court to infer guilt from negative inferences arising from demeanor evidence, Br. Pet. 37 (citing *United States v. Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991)), they ignore the fact that this type of inference will "not remedy a deficiency in the Government's proof if one existed." *United States v. Sliker*, 751 F.2d 477, 495 n.11 (2d Cir. 1984) (citing, *inter alia*, *Dyer*, 201 F.2d at 268-69), *cert. denied*, 470 U.S. 1058 (1985). West's explanation of his acquisition of the goods, though rejected by the jury, does not supply the missing proof that West obtained the goods through participation in the Westmoreland County theft.

Finally, in *Speight v. Commonwealth*, 354 S.E.2d 95, 98 (Va. Ct. App. 1987), cited at Br. Pet. 33, the court held that the factfinder could infer from defendant's incredible testimony that he lied to conceal his guilt. It did so,

however, where defendant's account was directly controverted by the testimony of an undercover police officer. The court found that there was "both direct and circumstantial evidence that Speight organized the disposition of the stolen property, as well as evidence that he was untruthful in his account of his participation." *Id.* at 99. There was no suggestion that the jury's rejection of Speight's testimony was either necessary or sufficient to prove one or more elements of the crime.

When the inference is viewed in proper perspective, the best the jury could do in this case – and the best that any reviewing court could do – was to hazard a guess as to whether respondent was guilty of participating in the Westmoreland County theft or of the lesser offense of larceny by receiving stolen goods with guilty knowledge. As West was charged only with the former, this Court must necessarily conclude that no rational juror could find the required proof of each element of the crime beyond a reasonable doubt.

D. The Court of Appeals' Ruling is Case-Specific and Poses No Threat to the Continued Use of the Inference.

The amicus brief filed at the certiorari stage by the Florida Attorney General, and joined by twenty-four states, claims that the decision below threatens the use of the inference in their jurisdictions. Their apprehensions are unjustified. The decision below does not undermine the validity of the inference *per se*; it only concludes that the evidence giving rise to the inference is insufficient to prove guilt beyond a reasonable doubt in this specific case.

Any concern that the court of appeals' reasoning will constrain the widely accepted use of inferences is unjustified because states rarely rely on the inference alone in order to prove guilt. Florida cites thirteen cases for the proposition that the inference alone is adequate to convict. Br. Fla.I 3-4 and n.1. Yet, even these cases almost invariably contain additional incriminating evidence,

besides possession of recently stolen goods, to sustain the convictions.²⁴ Nothing in this brief suggests that exclusive reliance on the inference is anything but a rarity.

²⁴ See *Ward v. State*, 658 S.W.2d 379, 380-81 (Ark. 1983) (defendant possessed and tried to pawn stolen property within two days of theft, fled upon questioning by police, removed the license plates from his car to conceal his identity, and implausible testimony was disproved), *habeas corpus granted sub nom. Ward v. Lockhart*, 841 F.2d 844 (8th Cir. 1988) (habeas relief granted under *Jackson v. Virginia*); *Winborne v. State*, 455 A.2d 357, 359 (Del. 1982) (defendant possessed stolen property within one day of theft, stolen items hidden in chair lining at defendant's apartment and defendant admitted participation in similar burglaries); *State v. McFall*, 549 P.2d 559, 560 (Kan. 1976) (defendant had access to stolen property, admitted the theft, told others about the alibi he would use should he become a suspect); *State v. Odom*, 393 S.E.2d 146, 149-50 (N.C. Ct. App. 1990) (defendant entered a department store empty-handed, left with a plastic bag filled with clothes, hid bag outside, was unable to produce a cash register receipt for the items in the bag); *State v. Deubler*, 343 N.W.2d 380, 382 (S.D. 1984) (appellant possessed stolen truck, gave contradictory versions of how he acquired the truck, lived near the crime scene); *Miller v. State*, 563 N.E.2d 578, 581 (Ind. 1990) (defendant seen leaving victim's house carrying a radio, identified by another witness, and found in possession of stolen radio within two days of the theft); *Sutherlin v. State*, 682 S.W.2d 546, 549 (Tex. Crim. App. 1984) (evidence of possession of stolen bulldozer five months after theft *inadequate* to prove theft); *State v. Robinson*, 561 A.2d 492, 493 (Me. 1989) (codefendant testified that Robinson was the perpetrator, and stolen items were found concealed in a laundry pile at defendant's home).

Florida's cite to *State v. Chambers*, 709 P.2d 321 (Utah 1985), in this context is incorrect. *Chambers* was concerned with the appropriate phraseology of a mandatory presumption, a matter which is not at issue in this case. As the Fourth Circuit noted below, Utah requires corroboration of the inference under *State v. Heath*, 492 P.2d 978, 979 (Utah 1972) ("mere possession of stolen property unexplained by the person in charge thereof is not in and of itself sufficient to justify a conviction of larceny"). Pet. App. 12. *State v. Hong*, 611 P.2d 595, 596 (Hawaii 1980), is also inapposite because it is concerned with the lesser offense of exercising unauthorized control over the property of another.

Of all the cases Florida cites, only *State v. Brown*, 744 S.W.2d 809 (Mo. 1988) and *Jackson v. Commonwealth*, 670 S.W.2d 828 (Ky. 1984), *cert. denied*, 469 U.S. 1111 (1985), permit conviction based on possession of stolen goods alone. However, in upholding the conviction, *Brown* makes no

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Next, Florida concedes that there is a trend in many states toward requiring corroborating evidence when the inference is used, yet it insists that requiring additional evidence is not a sign of weakness. Br. Fla.I 5-6. To the contrary, the fact that many states do require corroboration supports the respondent's position that the inference does not necessarily prove guilt in all situations. Thus, there is no genuine concern that the decision of the court of appeals has wider implications for jurisdictions that recognize this inference.

IV. THE PLAIN LANGUAGE OF 28 U.S.C. § 2254, SEPARATION OF POWERS PRINCIPLES, AND STARE DECISIS MANDATE THAT *DE NOVO* REVIEW IS THE PROPER STANDARD FOR MIXED QUESTIONS.

The Court has asked the parties to brief the question of whether the standard of review for mixed questions should be *de novo* or deferential. When faced with standard of review questions in other contexts, this Court has stated that the appropriate standard is found either in a "relatively explicit statutory command" or by reviewing a "history of appellate practice." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). At least since this Court's decision in *Brown v. Allen*, 344 U.S. 443 (1953), and Congress' passage of 28 U.S.C. § 2254 in 1966, state courts' constitutional rulings on mixed questions have consistently received independent review in the federal courts. Thus, in habeas cases, *both* a statutory command and a long history of appellate practice require *de novo* review of mixed questions.

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reference to either *Jackson v. Virginia* or *Ulster County Court*, and *Jackson v. Commonwealth* only discusses these cases in the context of whether the inference impermissibly shifts the burden of proof to the defendant.

A. *The Controlling Statute Requires De Novo Review of Mixed Questions and Questions of Law.*

Congress has vested jurisdiction for plenary review of constitutional claims of state prisoners with the federal judiciary. In 28 U.S.C. § 2254, Congress distinguished factual questions from all others and specifically required deference only when the habeas courts review findings of fact.²⁵ Any surface appeal of treating all state rulings deferentially must therefore give way to the reality that Congress drew meaningful distinctions between questions of fact and questions of law.

The statute specifically directs:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (1966).²⁶

²⁵ This Court recognized even before the 1966 statute:

The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary.

Townsend, 372 U.S. at 312.

²⁶ Amicus Criminal Justice Legal Foundation (CJLF) invites the Court to revisit the historical underpinnings of modern habeas review. Br. CJLF 2-14. Although other amici will reply, respondent will not debate the CJLF view of history. CJLF ignores the fact that *this Court* has repeatedly acknowledged that Congress adopted independent review in the 1966 structure of § 2254. See, e.g., *Jackson v. Virginia*, 443 U.S. 307, 323 (1979); *Cuyler v. Sullivan*, 446 U.S. 335, 341 (1980); *Miller v. Fenton*, 474 U.S. 104, 110-11 (1985). Congressional action renders moot the historical analysis that CJLF undertakes.

Moreover, CJLF does little more than gloss over one side of the academic debate that has been well documented for years. Compare Paul

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The language of subsection (a) is clear on its face. The statute gives incarcerated state prisoners a federal remedy, invoked by the prisoner's allegation of facts, which if proven, show that "he is in custody in violation of the Constitution." The *only* caveat is that the prisoner cannot obtain relief until all available state remedies are exhausted. 28 U.S.C. §§ 2254(b) and (c).

Section 2254(d) provides further support for this interpretation. In that section, Congress explicitly declared that factual findings by the state court after a full and fair hearing are presumed correct, unless one of eight statutory exemptions applies. See Br. Pet. 22-23 n.12. The scope of § 2254(d) includes all historical findings including those facts that bear on, *inter alia*, whether a defendant is competent to stand trial, e.g., *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (per curiam); whether a trial juror was properly excused because of his views on capital punishment, e.g., *Wainwright v. Witt*, 469 U.S. 412, 429 (1985); or whether a juror is impartial, e.g., *Patton v. Yount*, 467 U.S. 1025, 1036 (1984).

The § 2254(d) presumption of correctness was not included in § 2254(a), strongly suggesting that no deference was intended in § 2254(a). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.

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Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963) (rejecting theory of broad plenary habeas review for all constitutional claims) with Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 Harv. C.R.-C.L. L. Rev. 579 (1982) (supporting theory of plenary review based on historical analysis of the 1867 habeas statute). There is simply no reason for the Court to justify taking a fresh look now at this debate. No new insights have been offered by CJLF and hence, no need to revisit history.

1972). Read as a whole, § 2254 is a comprehensive statement by Congress that the federal courts must independently review habeas applications, save only for the deference required for state courts' fact-finding.

In response, petitioners offer no principled path to avoid the conclusion that the Court reached in 1979:

Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state court convictions have been secured in accord with federal constitutional law.

Jackson, 443 U.S. at 323. Thus, review properly falls within § 2254(a) and is plenary.²⁷

Moreover, even if the Court now concludes that the language of § 2254(a) is not plain, the fact that Congress did not change the statute to correct prior decisions of the Court²⁸ adds credence to the view that the earlier interpretation is accurate. "If we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us." *Teague*, 489 U.S. at 317 (White, J., concurring in the judgment); see also *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 n.21 (1985) (Congress may correct when the Court incorrectly construes statutes); Barry Friedman, *Legal Theory: A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. Rev. 1, 12 (1990) ("when Congress differed with the Court, as in the case of [habeas] factfinding, Congress spoke and the Court acquiesced").

²⁷ Under petitioners' construction, the statute would read as though Congress intended to provide deferential review to all questions presented in the habeas petition. It follows from petitioners' view that because questions of fact have exceptions to deference built into the statute under § 2254(d), Congress intended that these issues would receive the *least* amount of deference of the three types of questions. This anomalous result would turn the prevailing understanding of the 1966 Act upside down.

²⁸ E.g., *Jackson*, 443 U.S. at 323; *Miller*, 474 U.S. at 113; *Sumner v. Mata*, 455 U.S. 591, 597 (1982).

Given that this Court's construction of statutes stands unless Congress intercedes, it would be inappropriate now to readdress the standard of review issue. Yet, that is precisely what amici would have this Court do. CJLF's brief expresses its frustration by baldly asserting that "this Court must retain the ability to correct its own misinterpretation of statutes, *especially where Congress is deadlocked*." Br. CJLF 20 (emphasis added). CJLF cannot so easily avoid the fact that the Court's interpretation of the statute can only be deemed a "misinterpretation" if Congress affirmatively acts to overrule it by legislation. Moreover, the Court does not exist to break congressional "deadlocks" that are in reality nothing more than a failure to secure a political majority.

B. Separation of Powers Principles Suggest that Only Congress May Change the Standard of Review.

Though it is clear that the Court has expressed concern with the current functioning of the habeas corpus statute, it is equally clear that Congress has its own intense interest in the statute. Neither petitioners nor their amici can deny that habeas corpus is an issue Congress has revisited time and time again. Since 1966, in spite of repeated legislative efforts to reduce the scope of the right, Congress has refused to amend the statute accordingly.²⁹

Knowing that Congress is actively considering the core issue before the Court in this case, it would be inappropriate to preempt the legislature's prerogative to determine the fundamental need for habeas corpus in the federal system.³⁰ "Courts are not authorized to rewrite a

²⁹ See, e.g., S. 635, 102d Cong., 1st Sess. (1990) (barring relief on a claim that was "fully and fairly adjudicated" in state court); H.R. 1400, 102d Cong., 1st Sess. (1990) (same); S. 1760, 101st Cong., 1st Sess. 119 (1989) (reducing the scope of federal habeas relief in capital cases).

³⁰ The view that fundamental habeas reform is a legislative matter is widely recognized. See, e.g., The Attorney General's Crime Summit: Local

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statute because they might deem its effects susceptible of improvement." *Badaracco v. C.I.R.*, 464 U.S. 386, 398 (1984); see also *McCleskey*, 111 S. Ct. at 1482 (Marshall, J., dissenting) ("It is axiomatic that this Court does not function as a backup legislature for the reconsideration of failed attempts to amend existing statutes."). This Court has been mindful of the separation of powers doctrine in a number of other contexts:

[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches.

TVA v. Hill, 437 U.S. 153, 195 (1978); see also *FTC v. Ruberoid*, 343 U.S. 470, 478-79 (1952) ("The Commission has repeatedly sought similar [legislative] amendment of the Clayton Act provisions involved in this case. We will not now achieve the same result by reinterpretation in the face of Congress' failure to pass the bills thus brought before it.").

Congressional "deadlock" should not be mistaken for congressional silence or abdication of its powers in this field. "The nature, scope and continued availability of

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Control of Crime, Statement of Justice O'Connor, Washington, D.C. (March 4, 1991) at 8 ("in my view, further [habeas] reform is needed, and much of it will have to be statutory.").

Indeed, a Justice Department representative, in recent testimony stated:

Congress responded to *Townsend* by enacting a deferential standard of review for factual determinations, and there are compelling arguments that Congress should adopt a similar rule of deference to state court determinations of law and the application of law to the facts.

Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 102d Cong., 1st Sess. 13 (June 27, 1991) (testimony of Andrew G. McBride) (emphasis added).

these [habeas] remedies are purely matters of statute, which are within the power of Congress to determine." *Federal Post-Conviction Remedies: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 6 (May 7, 1991) (testimony of Sen. Orrin Hatch). Questions of whether independent habeas review is necessary are fundamentally political. Congress must be allowed to decide whether independent habeas review should be abandoned.

C. *Principles of Stare Decisis Compel the Court to Continue to Use the De Novo Standard for Mixed Questions.*

This Court's decisions recognize the importance of adhering to established precedent:

Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.

Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991). Lacking a "special justification" to reverse a previous decision, the Court should let stand the long line of cases supporting the use of a *de novo* standard of review for mixed questions of fact and law. See *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("any departure from the doctrine of *stare decisis* demands special justification").

1. *This issue has been settled by a long line of precedent.*

Consistent with the language of the statute, and mindful of the legislative function, this Court has repeatedly held that federal habeas courts must give *de novo* review to state courts' constitutional rulings on mixed questions. See, e.g., *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (evaluation of voir dire testimony of impaneled jurors to determine impartiality); *Townsend v. Sain*, 372 U.S. 293, 312 (1963) (voluntariness of a confession); *Neil v. Biggers*, 409 U.S. 188, 193, 199 (1972) (whether station house identification by victim was overly

suggestive); *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (waiver of right to assistance of counsel); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) (sufficiency of the evidence); *Rose v. Mitchell*, 443 U.S. 545, 561 (1979) (discrimination in selection of grand jury members); *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980) (whether retained defense counsel labored under an impermissible conflict of interest); *Sumner v. Mata*, 455 U.S. 591, 597-98 (1982) (per curiam) (whether pretrial identification procedures were proper); *Marshall v. Lonberger*, 459 U.S. 422, 430 (1983) (whether a guilty plea was voluntary); *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (per curiam) (whether constitutional error involving *ex parte* contact between juror and judge was harmless); *Strickland v. Washington*, 466 U.S. 668 (1984) (whether defense counsel provided effective assistance); *Miller v. Fenton*, 474 U.S. 104, 116-18 (1985) (voluntariness of confession); *Francis v. Franklin*, 471 U.S. 307, 314 (1985) (whether jury instruction created mandatory presumption that satisfied intent element for criminal conviction); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (whether death penalty was properly imposed without consideration of mitigating factors); *Maynard v. Cartwright*, 486 U.S. 356 (1988) (whether jury instructions in death penalty case satisfied statutory aggravating circumstances test under the Eighth Amendment); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (absence of jury instructions directing jurors to consider mitigating evidence in sentencing phase of capital case); *Lewis v. Jeffers*, 110 S. Ct. 3092, 3102-04 (1990) (whether due process was violated in application of statutory aggravating circumstances); *Estelle v. McGuire*, 112 S. Ct. 475, 481-82 (1991) (whether admission of expert testimony of prior injury was probative on question of intent).

When, as here, the Court has repeatedly determined that congressional intent in a given statutory scheme is clear, it is particularly important to follow principles of *stare decisis*. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"); see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

Furthermore, not only does a long line of relevant, analogous precedent support *de novo* review, but this Court's decision in *Jackson v. Virginia* squarely decided that *de novo* review is an appropriate standard for sufficiency questions.³¹ The United States attempts to diminish the significance of overruling *Jackson* because that Court viewed the habeas court's role "as no different" than in a direct appeal. Br. U.S. 19. However, *Jackson* cannot be so easily disregarded. The foundation for *de novo* review in the *Jackson* decision is built on the importance of the "basic question of guilt or innocence." 443 U.S. at 323. The "no rational juror" standard employed is sufficiently narrow that further restriction of collateral review was deemed unnecessary. The *Jackson* Court was well aware of the difference between habeas and direct review when it reached its decision. *Jackson* was decided three years after *Stone v. Powell*, 428 U.S. 465 (1976), a ruling which clearly articulated the Court's concerns about the proper confines of federal habeas review. See 428 U.S. at 475-82. The *Jackson* majority explicitly declined to include sufficiency claims under the limits identified in *Stone*. *Jackson*, 443 U.S. at 321. Ultimately, it is impossible to avoid the conclusion that reversing the standard of review to require deference for mixed questions generally, or *Jackson* claims specifically, would unduly impair the "reasonable

³¹ A *Jackson v. Virginia* case is not a proper vehicle for changing to a deferential standard of review. Unlike other mixed question decisions, *Jackson* has substantial deference built into its substantive review standard. The *Jackson* standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. . . . [and] impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Jackson*, 443 U.S. at 319 (emphasis added). Heightened deference to decisions made under the already deferential *Jackson* standard would be either redundant, or would fundamentally alter the substantive guarantee promised by *In re Winship*, 397 U.S. 358 (1970), that no person shall stand convicted except on proof beyond a reasonable doubt.

predictability"³² upon which the federal courts and litigants must be able to rely.

2. *There are no compelling reasons to revisit the issue.*

Petitioners offer two justifications for shifting to deferential standard of review, neither of which is a compelling reason to warrant overturning so much precedent. Petitioners first assert that the difficulty of distinguishing between questions of "pure law" and mixed questions of fact and law justifies using a single standard of review by federal courts. Br. Pet. 15 n.8. Their argument fails to recognize that this Court uses these distinctions to determine the appropriate standard of review for a wide variety of statutory and constitutional questions. See, e.g., *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). Though perhaps difficult to apply in some instances, the Court has never suggested that the determination of the appropriate standard of review could be ascertained in another, simpler fashion.

In the habeas context, the Court has always recognized that Congress deliberately used these distinctions to limit the power of the habeas court to redetermine factual findings of the state courts. For example, in *Miller*, while acknowledging the difficulty of establishing an "appropriate methodology for distinguishing questions of fact from questions of law. . . .," 474 U.S. at 113, the Court understood that § 2254(d) compelled it to determine whether voluntariness findings were subject to the

³² In the previous capital punishment cases . . . the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts and appellate courts must of necessity rely has been all but completely sacrificed.

Lockett v. Ohio, 438 U.S. 586, 628-29 (1978) (Rehnquist, J. concurring in part and dissenting in part) (citations omitted).

presumption of correctness.³³ The *Miller* Court's conclusion that it was not easy to decide the issue analytically did not prevent it from reaching a principled decision. The decision that "'voluntariness' is a legal question" was the end result of "considerations of stare decisis and congressional intent [plus] the nature of the inquiry itself. . . ." 474 U.S. at 115.

Moreover, reference to the problems identified in *Miller* are not availing here because there is no problem determining whether sufficiency claims are subject to § 2254(d) deference. That issue has not even been raised by petitioners.³⁴

Petitioners stress concerns of "finality, comity and federalism" as a second reason for a deferential standard of review for mixed questions in federal habeas courts, Br. Pet. 9, but offer no new concerns of federalism that were not squarely presented to, and rejected by, the *Jackson* Court. See 443 U.S. at 321. Concerns of federalism are admittedly important, however, this Court has taken many steps to accommodate those needs over the past fifteen years while always respecting the basic statutory scheme for habeas review. See *Stone v. Powell*, 428 U.S. 465 (1976) (barring exclusionary rule claims from habeas litigation where full and fair litigation of the issue at the state court has occurred because the exclusionary rule is not constitutionally required); *Teague*, 489 U.S. at 316 (applying "new rule" doctrine to ensure equal treatment of habeas and direct review petitioners); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (requiring a showing of "cause and prejudice" resulting from a procedural default before a constitutional claim may be adjudicated by a federal habeas court); *McCleskey v. Zant*, 111

³³ The *Miller* decision is one in a long line of decisions where the Court was called on to determine whether a question presented for review was entitled to the presumption of correctness under § 2254(d). See, e.g., *Wainwright v. Witt*, 469 U.S. 412, 427-28 (1985); *Patton v. Yount*, 467 U.S. 1025, 1037 (1984).

³⁴ Petitioners also claim that under *Teague*, questions of law are no longer accorded *de novo* review under the habeas statute and that mixed questions must be treated in the same manner. That issue is addressed elsewhere in this brief. See *post* pp. 44-49.

S. Ct. 1454, 1470 (1991) (applying the "cause and prejudice" standard to the abuse of the writ doctrine to limit successive federal habeas corpus petitions); *Coleman v. Thompson*, 111 S. Ct. 2546, 2552 (1991) (requiring a showing of "cause and prejudice" or proof that a "fundamental miscarriage of justice" will occur by failure to consider claim in habeas that was procedurally defaulted in state court). In these decisions, the Court never altered the statutory independent review requirement. Rather, the Court exercised its authority to determine prisoner entitlement to *any* federal habeas review.³⁵ In this context, the Court has carefully addressed the federalism concerns of petitioners and their amici. Any need for yet further retrenchment through reinterpretation of the fundamental meaning of the statute is a matter that must be left to Congress.

V. THIS COURT'S RECENT RETROACTIVITY DECISIONS ARE CONSISTENT WITH THE STATUTORY REQUIREMENT THAT HABEAS COURTS CONDUCT DE NOVO REVIEW OF QUESTIONS OF LAW AND MIXED QUESTIONS OF LAW AND FACT.

Petitioners assert that the cases establishing independent review of mixed questions were overruled *sub silentio* by this Court's decisions in *Teague v. Lane*, 489 U.S. 288 (1989), *Butler v. McKellar*, 494 U.S. 407 (1990), and *Saffle v. Parks*, 494 U.S. 484 (1990). Br. Pet. 11-19. They base their argument on perceived inconsistencies in the two lines of authority. There is, however, no inconsistency to be reconciled. Post-*Teague*, this Court has applied *de novo* review to mixed questions in *Lewis v. Jeffers*, 110 S. Ct. 3092, 3102-04 (1990), and *Estelle v.*

³⁵ "[H]abeas corpus filings per state prisoner remained fairly constant from 1945 to 1962, rose dramatically until 1970 and have steadily declined since . . . [to] 1.85 [federal habeas corpus petitions per hundred state prisoners] in 1988." Charles Weisselberg, *Evidentiary Hearings in Federal Habeas Corpus Cases*, 1990 B.Y.U. L. Rev. 131, 162-63 (1990).

Federal courts are not now overburdened with habeas hearings. "In 1988, only 1.11 percent of the habeas corpus petitions received evidentiary hearings, compared with 5.03 percent of all other civil cases." *Id.* at 167. Of course, this data precedes *Teague*.

McGuire, 112 S. Ct. 475, 481-82 (1991). The United States dismisses the continued use of *de novo* review because no party brought the standard of review issue to the Court's attention in those cases. Br. U.S. 21 n.10. The more reasonable view is that this Court did not consider its retroactivity decisions relevant to a determination of the appropriate standard of review in those cases.

A. The Cases Following *Teague* Are Consistent With the Standard of Review Decisions of this Court.

Though the Court's recent retroactivity decisions have certainly affected the scope of habeas review, they do not alter the fundamental plenary nature of that review. *Teague* created a structure by which a federal habeas court's plenary power would be confined to applying the settled law that was in place when the conviction was finalized. 489 U.S. at 310. Nothing in *Teague* or later cases alters the requirement that federal habeas courts conduct *de novo* review to determine whether the habeas applicant's rights were violated under that *settled* law.

Teague can only be understood by considering the harm it corrected: It protected state court convictions from being overturned by federal courts applying new rules developed after the state court ruling. 489 U.S. at 305. *Teague* also resolved the difficulties encountered by application of *Linkletter v. Walker*, 381 U.S. 618 (1965), the most important of which was the possibility of inconsistent results leading to "disparate treatment of similarly situated defendants on direct review." 489 U.S. at 303.³⁶

To achieve its purpose, the Court prohibited federal courts from applying "new rules" on habeas review. 489 U.S. at 310. *Teague* is a rule of nonretroactivity that is

³⁶ The Court illustrated the problem by reference to the result in *Johnson v. New Jersey*, 384 U.S. 719, 733-35 (1966). There, under the *Linkletter* standard, "the Court's refusal to give *Miranda* retroactive effect resulted in unequal treatment of those who were similarly situated." *Teague*, 489 U.S. at 303.

consistent with the statutory structure of independent habeas corpus review. After *Teague*, a federal court must provide a habeas petitioner with the same – but no more – relief than he would have received if his federal review took place before his state conviction became final. *Teague* does not alter the degree of deference applied in habeas review.

Petitioners nevertheless assert that *Butler* and *Saffle* extended the *Teague* doctrine “beyond an ordinary concept of non-retroactivity.” Br. Pet. 18. Petitioners conclude that a federal habeas court must now accept a state court’s interpretation and application of constitutional law “unless the merits of [the] claim were so clear at the time of the state court decision that no reasonable jurist could have rejected it.” Br. Pet. 18. This reading of *Butler* and *Saffle* is unreasonable.

To be sure, both *Butler* and *Saffle* conclude that the new rule principle validates “reasonable, good faith interpretations of existing precedents.” *Butler*, 494 U.S. at 414; *Saffle*, 494 U.S. at 488. Petitioners, however, ignore what the Court clearly recognized: reasonable interpretations of law could only be “validated” if habeas courts could conduct the plenary review required by § 2254(a). Surely, if the *Teague* Court thought deference to state court constitutional rulings could be achieved in a more direct and simple fashion, such as ignoring the statutory requirements, it would have done so.

The new rule principle only restricts the habeas court from granting the writ if it concludes that the basis for its decision was not compelled under the “constitutional standards that prevailed at the time the original proceedings took place.” 489 U.S. at 306 (citing *Desist v. United States*, 394 U.S. 244, 262-63) (1969) (Harlan, J., dissenting)). To ensure that precedent is not extended, the Court looks to see if the rule urged by the habeas applicant was being debated in the lower courts when it was decided in state court. If it was subject to debate, the rule is a new one for *Teague* purposes because it was not settled law. *Butler*, 494 U.S. at 415.

The *Teague* test is not deferential, but objective. Habeas courts can apply the “new rule” test even if the state court did not issue a written opinion. The habeas court looks to the

established federal law at the relevant time and applies that law. See, e.g., *Saffle*, 494 U.S. at 489. This is precisely what the court of appeals did here. It applied the law in effect – namely, *Jackson* and *Ulster County Court* – at the time the conviction became final.³⁷

B. Deferential Review of Mixed Questions Is Not a Logical Extension of *Teague*.

While the United States, as amicus curiae, does not go so far as to claim that *Teague* decided the standard of review question posed by the Court, it does argue that continued use of *de novo* review for mixed questions is “incongruous” given that *Teague* requires the habeas court “to defer to state court legal conclusions” of “pure law” determinations and the statute itself requires deference to factual findings. Br. U.S. 16 n.6. The United States concludes that there is no distinguishing feature to justify a different standard of review for mixed questions. Br. U.S. 16-18.

This argument, however, is based on a faulty premise. *Teague* does not require federal courts to defer to state court determinations on questions of “pure law.”³⁸ It only

³⁷ Petitioners complain here that the court of appeals made a “judgment call” that the evidence in this case was insufficient. Br. Pet. 26. This objection misses the point. While it is true that the ruling below was a judgment call, the court of appeals correctly noted that judgment was compelled by the *Jackson* standard: “Application of the *Jackson v. Virginia* due process test . . . is necessarily an evidence-specific judgment call.” Pet. App. 13. That the decision of a court of appeals under *Jackson* may have been a “judgment call,” however, does not suggest that *Jackson* was incorrectly applied. Regardless of the standard of review, any decision to reverse or affirm in a close case may be a judgment call. This quality certainly does not connote retroactive application of new law and does not violate *Teague*.

³⁸ Thus, the United States, in recent congressional hearings has noted:

fixes in time the "pure law" that applies to the habeas case before the court. Thus, the habeas applicant is entitled to no better interpretation of the law than he would have received upon certiorari review of the state court judgment. This new rule concept operates in mixed question situations by preventing the habeas court from applying new legal principles developed after the state conviction became final. New developments in the law would not be applied by the federal court when deciding a mixed question presented by the habeas petition.

The deferential review of mixed questions proposed by petitioners is, if anything, inconsistent with *Teague*. The primary purpose of the *Teague* rule is to ensure that the habeas applicant gets *no more* protection than he was entitled to when the state court adjudicated his constitutional claim. 489 U.S. at 306. *Teague*, however, does not seek to ensure that the habeas applicant gets something decidedly *less* from the habeas court than he was entitled to under settled law. "[T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated. . . ." 489 U.S. at 315. Under the rule advanced by petitioners and amici, habeas applicants who are "reasonably" denied constitutional rights under settled law will not receive the benefit of those rights, while those who are denied rights "unreasonably" under settled law will get the benefit.

Thus, the elimination of any independent review raises obvious problems of disparate treatment for similarly situated habeas applicants, the precise evil that *Teague* sought to

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Congress has already mandated that factual determinations of state courts arrived at in full and fair proceedings should not be overturned unless the habeas petitioner can demonstrate by clear and convincing evidence that the state court determination was erroneous. 28 U.S.C. § 2254(d). Yet, under present law, the legal determinations of state courts are entitled to no weight at all in a federal habeas corpus proceeding.

Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 102d Cong., 1st Sess. 19 (June 27, 1991) (testimony of Andrew G. McBride).

remedy. 489 U.S. at 305 ("the [previous] standard also led to unfortunate disparity in the treatment of similarly situated defendants on collateral review"); accord *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2440 (1991) (declaring that in the civil context, "similarly situated litigants should be treated the same") (citing *Griffith v. Kentucky*, 479 U.S. 314 (1987)). Petitioners' rule of deference undermines consistent enforcement of constitutional law, and induces the harm the *Teague* Court sought to avoid. It is, therefore, simply wrong to say that *Teague* is a rule for "pure law" questions that should be extended to mixed law questions in the name of "symmetry." Br. U.S. 13.

C. Deferential Review is Not a Workable Rule.

The United States complements its "symmetry" argument with a claim that its proposed standard is a readily workable rule. Br. U.S. 15. This proposition is dubious. Ease of application assumes that the habeas court will be able to readily identify the state's reasons for its decision and, once found, that these reasons will provide a clear, complete and accurate exposition of the relevant federal law.³⁹ Certainly the Court's experience with the "independent and adequate state grounds" rule suggests that the habeas court's review

³⁹ Identification of the state's reasoning would be difficult in this case. Based on the state record, the federal habeas court would have to defer to the following rulings:

"THE [TRIAL] COURT: We overrule the motion [to strike the evidence]." J.A. 19.

"THE [TRIAL] COURT: We overrule the [renewed] motion [to strike the evidence]." J.A. 30.

"THE [TRIAL] COURT: We will overrule that motion [to strike the evidence and set aside the verdict]." J.A. 36.

"In the Supreme Court of Virginia. . . . Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case." J.A. 41.

"In the Supreme Court of Virginia. . . . Upon a Petition for a Writ of Habeas Corpus. . . . Applying the rule in . . . *Hawks v. Cox*, 211 Va. 91, 175

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of the state record will not always be easy or fruitful. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("plain statement" rule adopted to promote clearer state court rulings). Moreover, even if the state court articulates the basis for its decision, the habeas court will first be required to determine whether the state court's ruling reflects a correct understanding of the governing constitutional principles before it can defer to the application of those principles for a given set of facts. *Cf. Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) ("[w]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue").

Thus, the habeas court will be required to determine the accuracy of the constitutional test applied before it can determine what standard of review to use. The body of law that will develop from this preliminary ruling will likely track the problems of the "plain statement" decisions. Moreover, this will result in two classes of review: (1) *de novo* review if there is no articulation of a constitutional standard, or if the state court ruling is incomplete or inaccurate; and (2) deferential review if the correct standard is used by the state court. This is not a "workable" rule.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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S.E.2d 271 (1970), [holding that habeas petitioner is not entitled to consideration of previously adjudicated claims] to petitioner's allegations 1, 2, 3, 4 and 5 . . . the Court is of [the] opinion that the writ of habeas corpus should not issue as prayed for." J.A. 48.

APPENDIX

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed

App. 2

to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

App. 3

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

No. 91-542

SUPREME COURT, U.S.
FILED

MAR 14 1992

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

ELLIS B. WRIGHT, JR., WARDEN, et al.,
Petitioners,
v.

FRANK ROBERT WEST, JR.,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I

CONGRESS HAS NOT MANDATED *DE NOVO* FEDERAL COLLATERAL REVIEW OF STATE PRISONERS' CONSTITUTIONAL CLAIMS.

The argument of the respondent and his *amici* that 28 U.S.C. § 2254 evidences an intent by Congress that a federal habeas corpus court conduct *de novo* review of state prisoners' constitutional claims finds no support in the language of the statute. While it is clear that the statute grants federal courts the authority to "entertain" such claims, *see* § 2254(a), and provides that federal review of state court findings of fact is governed by a presumption of correctness, *see* § 2254(d), the statute is totally silent with respect to the *type* of review required when a federal habeas court reviews a state court's legal conclusions. *See Brown v. Allen*, 344 U.S. 443, 462 (1953) ("in enacting . . . § 2254, . . . Congress made no reference to the power of a federal district court over federal habeas corpus for claimed wrongs previously passed upon by state courts"). Instead, 28 U.S.C. § 2243 merely provides that the federal court "shall . . . dispose of the matter as law and justice require."¹ *See Brown*, 344 U.S. at 462 ("This has long been the law").

This Court, however, has made it abundantly clear that Congress has *not* mandated *de novo* collateral review. Despite the fact that the language of § 2254(a) makes no

¹ Indeed, the American Bar Association admits that Congress has not "expressly" mandated *de novo* review. (See ABA *Amicus* Brief at 10).

distinction among the types of constitutional claims that a federal court "shall entertain," this Court has ruled repeatedly that there are many instances where a state prisoner has no right to *de novo* review. For instance, the procedural default cases from *Wainwright v. Sykes*, 433 U.S. 72 (1977), to *Coleman v. Thompson*, 111 S.Ct. 2546 (1991), demonstrate that, when a state prisoner's constitutional claim has been barred by a state's procedural rule, no federal review of the claim is required unless he can show both "cause" and "prejudice" for his default.²

Similarly, *Stone v. Powell*, 428 U.S. 465 (1976), demonstrates that, even when a constitutional claim has been properly preserved, the scope of federal habeas review can be as minimal as the "full and fair opportunity" inquiry that *Stone* established for Fourth Amendment claims. Indeed, *Stone* explicitly noted that it has been *this Court* that has traditionally defined the scope of the writ, 428 U.S. at 475-482, and *Stone* necessarily rejected the

² West contends that the procedural default cases "never altered the statutory independent review requirement" and represent merely an example of this Court's exercising "its authority to determine prisoner entitlement to *any* federal habeas review." (Resp. Br. 44; emphasis in original, footnote omitted). If this were true, however, one might reasonably ask how this Court could have the authority to deny a state prisoner *any* federal collateral review if the statute does not make an exception for defaulted claims and the congressional mandate for *de novo* review is as clear as West contends. See *Kuhlmann v. Wilson*, 477 U.S. 436, 448 n.8 (1986) (the procedural default cases "plainly concern the 'general scope of the writ'").

view of the dissent that the majority opinion was contrary to the intent of Congress. See *id.* at 502-536 (Brennan, J., dissenting). In fact, West's argument that § 2254(d)'s requirement of deferential review for state factual findings represented Congress' ratification of *de novo* review for legal questions (Resp. Br. 34-37) is *the very same argument unsuccessfully asserted by the Stone dissent*, *id.* at 528, and later by the dissent in *Butler v. McKellar*, 110 S.Ct. 1212, 1225 n.10 (1990) (Brennan, J., dissenting). See also *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) ("It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation") (citation omitted).

Likewise, *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny settled beyond any dispute that *de novo* federal collateral review is not mandated by § 2254. The whole point of those cases is that the purpose of the writ does not require subjecting a state court's reasonable good faith decision to *de novo* review by a federal habeas court. See *Teague*, 489 U.S. at 306; *Butler*, 110 S.Ct. at 1216-1217; *Saffle v. Parks*, 110 S.Ct. 1257, 1260 (1990); *Sawyer v. Smith*, 110 S.Ct. 2822, 2827 (1990). These decisions necessarily rejected the respective dissenting opinions that Congress had mandated *de novo* federal collateral review of state prisoners' constitutional claims. See, e.g., *Teague*, 489 U.S. at 327 (Brennan, J., dissenting); *Butler*, 110 S.Ct. at 1218-1219, 1224-1226, n.12 (Brennan, J., dissenting) ("Congress thus entitled prisoners to *de novo* review of their

federal claims in federal habeas proceedings");³ *Sawyer*, 110 S.Ct. at 2841 (Marshall, J., dissenting).

Thus, while it is clear that Congress has defined the scope of the writ with respect to reviewing state court findings of fact, *see* § 2254(d), this Court's cases make it equally clear that it has been this Court, *not* Congress, that has defined the scope of the writ with respect to the review of legal questions. Indeed, both *Teague* and *Butler* unequivocally embrace the concept that this Court is "responsible for defining the scope of the writ. . . ." *See Butler*, 110 S.Ct. at 1216, *quoting Teague*, 489 U.S. at 306. *See also Kuhlmann v. Wilson*, 477 U.S. 436, 447-448 (1986) ("The Court has performed its statutory task through a sensitive weighing of the interests implicated . . ."); *Rose v. Lundy*, 455 U.S. 509, 548 n.18 (1982) (Stevens, J., dissenting) (the Court's limiting federal habeas review to a

³ Neither the respondent nor any of his *amici* comes to grips with the fact that in *Butler* the four dissenting Justices, including two Members of the present Court, expressly agreed that the effect of *Butler* was to end *de novo* federal collateral review of state prisoners' constitutional claims. *See* 110 S.Ct. at 1226 n.12 (Brennan, Marshall, Blackmun and Stevens, JJ., dissenting) ("The Court's decision today to limit *de novo* federal review of alleged constitutional defects in a state criminal proceeding to direct review by this Court . . . thwarts Congress' intent to provide for effective federal review of such state proceedings . . ."). Even commentators who disagree with this Court's decisions in *Teague* and its progeny are forthright enough to concede the impact of those cases on *de novo* review. *See, e.g., Patchel, The New Habeas*, 42 *Hast.L.J.* 941, 1000 (1991) (*Butler* "replaces the federal habeas court's *de novo* consideration of issues of constitutional law recognized in *Brown [v. Allen]* with what amounts to a 'clearly erroneous' standard of review . . .").

relatively small group of "fundamental" claims would be "consistent with the intent of Congress that enacted § 2254 in 1948").

In his concurring opinion in *Teague*, Justice White stated, "If we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us." 489 U.S. at 317 (White, J., concurring). If, as respondent and his *amici* argue, Congress truly had mandated *de novo* federal collateral review of state prisoners' constitutional claims, then surely Congress would have acted clearly and decisively to "correct" this Court's decisions in *Sykes*, *Stone*, and the *Teague* line of cases. The fact that Congress has *not* done so certainly does not support West's argument.

Finally, the contention that recent "actions" of the Congress evidence a legislative intent to mandate *de novo* collateral review is singularly illogical. (See, for example, New York *Amicus* Brief at 8-9). Whatever "actions" individual Houses or a conference committee may have taken in the name of habeas corpus reform, the undeniable fact is that Congress, as an institution, has failed to pass *any* legislation altering the language of § 2254 or otherwise mandating *de novo* review of state prisoners' constitutional claims. *See Patterson*, 491 U.S. at 175 n.1 ("Congress may legislate . . . only through the passage of a bill which is approved by both Houses and signed by the President"). Moreover, the legislation approved by the Senate-House conference committee contains no provisions that can even arguably be described as requiring *de novo* review. In fact, § 2256 of the proposed legislation provides that a federal habeas court "shall not apply a new rule" – hardly a congressional mandate for *de novo*

review. See Conference Report to accompany HR3371, 137 Cong. Rec. H11686-11744 (daily ed. Nov. 26, 1991).

II

WEST'S CONTENTION THAT *TEAGUE/BUTLER* "REASONABLENESS" REVIEW DOES NOT APPLY TO CASES INVOLVING THE APPLICATION OF SETTLED LAW IS FORECLOSED BY *STRINGER V. BLACK*.

Respondent contends that *Teague* and its progeny merely prohibit a federal habeas court "from applying new legal principles developed after the state court conviction became final" and are essentially irrelevant when the case involves applying settled law. (Resp. Br. 48). This argument is demonstrably wrong.

In *Stringer v. Black*, 112 S.Ct. ___, slip op. 4 (Mar. 9, 1992), this Court recently held:

The interests of finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent. [Emphasis added].

And, while the Court held that *Stringer*'s particular constitutional claim was not barred from federal habeas review, it did so only because "there was no arguable basis" upon which the state court could have rejected the claim at the time his conviction became final. *Id.*, slip op. 8. The result in *Stringer*, moreover, refutes the suggestion

of West and his *amici* that applying the "reasonableness" standard is tantamount to no federal review at all.⁴

West claims that he is not seeking the benefit of a "new rule." He simply cannot deny, however, that he is seeking "the application of an old rule," i.e., the rule of *Jackson v. Virginia*, 443 U.S. 307 (1979), "in a manner that was not dictated by precedent." See *Stringer*, slip op. 4. A claim is "dictated by precedent" only if no reasonable

⁴ Refusing to apply the "reasonableness" standard to so-called "mixed" questions of law and fact would force the federal courts into a regime of line-drawing designed to discern the "difference" between "pure law" and "mixed" questions. Such a regime inevitably would lead to the type of obtuse analysis recently engaged in by the United States Court of Appeals for the Seventh Circuit:

[W]e adopt the following analysis when deciding whether a case announces a new rule under *Teague*. First, we determine whether the case clearly falls in one category or another – if it overrules or significantly departs from precedent, or decides a question previously reserved, it is a new rule, while if it applies a prior decision almost directly on point to a closely analogous set of facts, it is not. Second, when the question is a close one, we will look to (1) whether the case at issue departs from previous rulings by lower courts or state courts, and (2) the level of generality of prior precedent in light of the factual context in which that precedent arose.

Taylor v. Gilmore, ___ F.2d ___, ___, 1992 WL 6955 (7th Cir., Jan. 21, 1992) (emphasis added). As *Taylor* demonstrates, maintaining and monitoring a distinction between "pure law" and "mixed" questions will render the task of the lower federal courts even more difficult than it already is. The *Teague/Butler* "reasonableness" standard, on the other hand, is straightforward and easy to apply.

court could have rejected it. *See Sawyer*, 110 S.Ct. at 2827. No one can seriously argue that no reasonable court could have rejected West's sufficiency-of-the-evidence claim at the time his conviction became final. Indeed, even today, it is impossible to conclude that the Constitution *compels* an acquittal where, as here, the state proves that a person charged with larceny was found in recent, exclusive possession of the stolen goods and the jury determines that his explanation for his possession is a lie.

CONCLUSION

The tactic of West and his *amici* has been to ignore the meaning of *Teague* and its progeny with respect to the scope of federal habeas corpus and the lack of a legislative mandate for *de novo* federal collateral review. Instead, they have attempted to paint a "doomsday" scenario that wrongly equates a reasonable good faith judgment by a state court with a denial of a state prisoner's constitutional rights. This Court, however, should make clear once and for all that the granting of federal habeas relief where the state court acted reasonably and in good faith constitutes a trivialization of the writ that cannot be countenanced: "The writ has no enemies so deadly as

those who sanction the abuse of it, whatever their intent." *Brown v. Allen*, 344 U.S. at 544 (Jackson, J., dissenting).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

ELLIS B. WRIGHT, JR., WARDEN, ET AL., PETITIONERS

v.

FRANK ROBERT WEST, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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QUESTION PRESENTED

The United States will address the following question:

In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to a judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?

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**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

INTEREST OF THE UNITED STATES

This case presents the question whether a federal court in a habeas corpus proceeding under 28 U.S.C. 2254 should defer to the state court's application of law to the specific facts of the habeas petitioner's case, or whether the federal court should review the state court determination *de novo*. Resolution of this issue requires assessment of the proper balance between the scope of federal habeas corpus and interests in comity and the finality of state determinations. The United States, no less than the States, has an interest in maintaining that proper balance. In addition, the United States has in the past participated in several important habeas corpus cases. See,

e.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Reed v. Ross*, 468 U.S. 1 (1984); *Engle v. Isaac*, 456 U.S. 107 (1982); *Murray v. Carrier*, 477 U.S. 478 (1986).

STATEMENT

Sometime between December 13 and December 26, 1978, Angelo Cardova's home in Westmoreland County, Virginia was burglarized and items worth about \$3,000 were taken. Pet. App. 2. On January 10, 1979, while investigating an unrelated crime, law enforcement authorities discovered goods stolen from the Cardova home in the home of respondent Frank West. The goods recovered included two television sets, a mirror framed with shells, a wood carving, groceries, a fake fur jacket with the name Esther embroidered in the lining, a silk jacket decorated with the term "Korea 1970" a mounted lobster, and other property. *Id.* at 2-3. The value of these items was about \$1,100. *Ibid.*

Respondent was indicted and tried for grand larceny. He testified at trial that he had bought the stolen goods at various flea markets. J.A. 21. In particular, respondent maintained that he had purchased some of the items from one Ronnie Elkins, but could not recall when or where he had done so. *Id.* at 22-28. The court of appeals characterized respondent's testimony as "somewhat confused," and noted that respondent was unable to account for how he had obtained some of the stolen goods. Pet. App. 4. Elkins did not testify, and respondent explained that he had not called Elkins as a witness because he had not known until trial which items he had been accused of stealing. *Ibid.*

The jury was properly instructed as to the elements of the offense for which respondent was

charged, as well as to the fact that it must have a moral conviction of respondent's guilt beyond a reasonable doubt in order to convict. J.A. 32-36. The jury was also instructed concerning the long-established Virginia common law inference that a person in exclusive possession of recently stolen goods stole those goods if he fails to explain, or falsely explains, his possession. Pet. App. 4. The jury convicted. Respondent moved to set aside his conviction on the ground that the evidence was insufficient to support the verdict, and the trial court denied the motion. On May 30, 1980, the Supreme Court of Virginia rejected respondent's appeal, having found no reversible error. J.A. 37-41.

Seven years later, respondent filed a state habeas corpus petition, arguing that the evidence against him was insufficient to support the jury's verdict. J.A. 42-43. On May 13, 1988, the Supreme Court of Virginia denied relief. *Id.* at 48-49.

Respondent thereafter filed a habeas corpus petition in federal district court under 28 U.S.C. 2254, alleging *inter alia* that his conviction was unconstitutional because the evidence against him did not prove his guilt beyond a reasonable doubt. The district court denied relief, holding that credibility determinations are beyond the province of a federal habeas proceeding, and that a jury could rationally have found respondent guilty beyond a reasonable doubt based on the evidence presented. Pet. App. 23-33.

On April 29, 1991—almost eleven years after respondent's conviction became final—the court of appeals reversed the district court, and ordered that respondent be granted habeas relief. Pet. App. 1-22. The court of appeals analyzed respondent's claim under the sufficiency standard of *Jackson v. Virginia*,

443 U.S. 307 (1979), which requires the court to determine whether, viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found guilt beyond a reasonable doubt.

The court of appeals held that it was irrational for the jury to infer from the basic facts proved by the Commonwealth that respondent was guilty beyond a reasonable doubt.¹ Pet. App. 20. The court acknowledged that respondent's testimony was confused, but thought that his explanation was not "inherently implausible" and could "not fairly be treated as positive evidence of guilt." *Id.* at 18-19. Respondent's testimony "was, at most, a neutral factor in assessing the probative force of the inference." *Id.* at 19. Having therefore removed from the analysis the fact that the jury disbelieved respondent's "confused" testimony, the court held that the lapse in time between the theft and the discovery of the stolen goods in respondent's home, the fact that the goods possessed by respondent made up only a third of the value of the stolen goods, and the lack of corroborating evidence, made it impossible for any trier of fact to find guilt beyond a reasonable doubt. *Id.* at 14-20. The court held that respondent's conviction therefore violated due process and that he was entitled to habeas relief. *Id.* at 20.

The court acknowledged "special caution and anxiety" in concluding that a state jury of twelve acted irrationally, and that a state trial and appellate court, as well as a federal district court, were wrong

¹ The court of appeals adopted, as a framework for analyzing the rationality of a jury verdict based on the common law permissive inference, the Eleventh Circuit's analysis in *Cosby v. Jones*, 682 F.2d 1373 (1982).

in ruling that the evidence was sufficient to convince a rational trier of fact of respondent's guilt. Pet. App. 20-21. "Aware of its special delicacy * * * we nevertheless have felt obliged under the constitutional test we apply to make that determination here." *Id.* at 21.

INTRODUCTION AND SUMMARY OF ARGUMENT

In reviewing habeas corpus claims, federal courts are confronted with three sorts of questions: purely legal questions, mixed questions of law and fact, and factual questions. This Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), and later cases applying its principles, altered the scope of federal court review of state court legal determinations by restricting habeas corpus review of claims seeking "new" rules of law. As a result of these recent decisions, federal habeas corpus courts now must ordinarily defer to reasonable, good faith interpretations of law by state courts. As to factual questions, it has long been established that state court factual conclusions are presumptively correct in federal habeas corpus proceedings. 28 U.S.C. 2254(d). Against this backdrop, this case calls for the Court to determine whether the third category—mixed questions of law and fact—should continue to be the sole type of issue subject to de novo review in federal habeas corpus proceedings. It should not.

1. Federal habeas courts now defer to reasonable, good faith interpretations of law by state courts. This Court has established that habeas review is not available if the habeas petitioner seeks to establish a "new rule" to overturn his conviction; the Court has in turn defined a "new rule" as one that was not unambiguously compelled by existing precedent at the

time the conviction became final. See *Teague v. Lane*, 489 U.S. 288, 299-310 (1989) (plurality opinion); *Butler v. McKellar*, 494 U.S. 407, 412-416 (1990); *Saffle v. Parks*, 494 U.S. 484, 488 (1990). The question on habeas is not whether the state court's legal determination was the same one the federal habeas court would make, but whether the state court's determination conflicted with an established rule so clear as not to be "susceptible to debate among reasonable minds." *Butler*, 494 U.S. at 415. If it did not, then the habeas petitioner seeking to overturn that legal determination is seeking a "new rule" under *Teague*, and is barred from habeas relief. The end result of *Teague* and its progeny is to "validate[] reasonable, good-faith interpretations of existing precedents by state courts even though they are shown to be contrary to later decisions." *Butler*, 494 U.S. at 414.

As to findings of fact, it has long been established that factual findings in state criminal proceedings are entitled to a presumption of correctness in federal habeas proceedings. 28 U.S. 2254(d).

2. The current habeas landscape is thus characterized by the incongruous feature that mixed questions of law and fact are the only issues subject to de novo review in federal habeas corpus proceedings. As with legal and factual issues, however, the purposes of habeas corpus are fully served by deferential habeas review of application of law to fact. In terms of the underlying functions of habeas corpus, there is no meaningful distinction between state court interpretations of existing law and application of that law to particular facts. A state court that has acted reasonably and in good faith cannot be expected to do more, and will not be prompted to act more carefully by the prospect of a reversal years later on fed-

eral habeas review of a reasonable, but technically wrong, decision.

Unless this Court brings the standard of review for mixed questions of law and fact into line with the standard for reviewing legal questions and the standard for reviewing factual determinations, it is predictable that habeas claims will typically be couched in terms that purport to seek application of settled law to specific facts. Claims that in fact rest upon a call for expansion of the law on habeas corpus will be recast as claims regarding the sufficiency of the evidence, or as claims going to the "fundamental fairness" of the habeas petitioner's trial. See *Jackson v. Virginia*, 443 U.S. 307 (1979); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). This case illustrates that danger. Respondent's real quarrel is not with the sufficiency of the evidence at his trial, but with the validity of the common law inference that the jury was permitted to apply. Yet a frontal assault on the constitutionality of the permissive inference would have been barred by *Teague* and its progeny.

The rule we advocate is undoubtedly in tension with this Court's past treatment of mixed questions of law and fact. But the premises for de novo review of such questions have been fatally undermined by *Teague* and its progeny. In terms of the nature and function of habeas corpus, there is no basis for disparate treatment of legal and mixed questions. In addition, the Court's analysis in *Jackson v. Virginia*, *supra* (establishing the rule that federal habeas courts must review sufficiency of the evidence claims to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt), was explicitly premised on the view that the federal

courts perform the same function on direct and collateral review. 443 U.S. at 317-318. That premise has since been undermined. See, e.g., *Teague*, 489 U.S. at 306 (plurality opinion); *United States v. Frady*, 456 U.S. 152, 164-165 (1982) (proceedings under 28 U.S.C. 2255).

3. Applying a rule of deference to reasonable state court treatment of mixed questions of law and fact, the proper outcome in this case is clear. The Virginia courts acted reasonably in concluding that the evidence against respondent was sufficient to establish his guilt beyond a reasonable doubt.

ARGUMENT

I. A STATE COURT'S REASONABLE, GOOD FAITH APPLICATION OF LAW TO FACT IN A CRIMINAL PROCEEDING IS ENTITLED TO DEFERENCE IN SUBSEQUENT FEDERAL HABEAS CORPUS PROCEEDINGS

This Court's recent decisions have emphasized the basic purposes of federal habeas corpus—to ensure that state criminal proceedings are conducted consistently with the Constitution as interpreted at the time of the proceedings, and to deter unconstitutional action on the part of state courts. See *Teague v. Lane*, 489 U.S. 288, 306-307 (1989) (plurality opinion); *Butler v. McKellar*, 494 U.S. 407, 413-414 (1990); *Saffle v. Parks*, 494 U.S. 484, 488 (1990). The Court has also emphasized that, in determining the scope of habeas corpus, the costs of habeas review in terms of finality and comity must be considered. *Butler*, 494 U.S. at 412-414; *Coleman v. Thompson*, 111 S. Ct. 2546, 2554 (1991). The purposes of habeas review are fully served, and its costs minimized, by a rule that a state court's reasonable, good

faith application of law to fact in a criminal proceeding is entitled to deference in federal habeas corpus.

A. *Teague* And Its Progeny Establish That Federal Habeas Courts Must Not Disrupt Reasonable, Good Faith Interpretations Of Law By State Courts

In order to achieve the proper ends of habeas corpus, while minimizing injury to important values of finality and comity, this Court held in *Teague* that a habeas corpus petitioner may not seek to overturn his conviction based on a "new rule" of law. See 489 U.S. at 310 (plurality opinion); *id.* at 316-317 (White, J., concurring in part and concurring in the judgment).² *Teague* defined a new rule as one that is not "dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 301 (plurality opinion).

In the wake of *Teague*, the Court in *Butler*, *Saffle*, and *Sawyer v. Smith*, 110 S. Ct. 2822 (1990), reaffirmed this understanding of what constitutes a "new rule" under *Teague*. The Court stated in *Saffle* that a habeas petitioner is seeking a new rule unless "a state court considering [the] claim at the time [the petitioner's] conviction became final would have felt compelled by existing precedent to conclude that the rule * * * was required by the Constitution." *Saffle*, 494 U.S. at 488. For a claim to be compelled or

² This rule is subject to two exceptions: A claim seeking a new rule is cognizable on habeas if the rule (1) places certain kinds of primary conduct beyond the power of the State to proscribe, or (2) is a watershed rule of procedure without which the likelihood of an accurate verdict is seriously reduced. See *Teague v. Lane*, 489 U.S. at 311 (plurality opinion); *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989); see also *Mackey v. United States*, 401 U.S. 667, 692-693 (1971) (separate opinion of Harlan, J.).

dictated by existing precedent, it is not enough that it "is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision," because even in such circumstances it is often possible to reach a "reasonable contrary conclusion[]." *Butler*, 494 U.S. at 415. See also *Saffle*, 494 U.S. at 491 (if existing precedents "inform, or even control or govern, the analysis of [the habeas petitioner's] claim, it does not follow that they compel the rule that [he] seeks"); *Sawyer*, 110 S. Ct. at 2828 (the fact that the rule sought by a habeas petitioner was "a predictable development" based on existing law does not suffice to show that the rule is not new). If the legal interpretation sought by the habeas petitioner was "susceptible to debate among reasonable minds" at the time his conviction became final, *Butler*, 494 U.S. at 415, then it is a "new rule" under *Teague*, *Butler*, *Saffle*, and *Sawyer*—i.e., one that was not "dictated by precedent," *Teague*, 489 U.S. at 301 (plurality opinion)—and the claim based on that new rule is accordingly not cognizable on federal habeas corpus.

Because *Teague* made the inquiry into whether a habeas petitioner seeks a new rule ~~is~~ a threshold question, see 489 U.S. at 300-301, 315-316 (plurality opinion), the effect of that case—together with the elaboration in subsequent cases of what constitutes a "new rule"—is to remove from federal habeas proceedings any room for disagreement over the appropriate legal standard to be applied.³ If there is any

³ Our reading of the effect of *Teague* and its progeny is confirmed by the Fourth Circuit's decision in *Bunch v. Thompson*, No. 90-4001 (Nov. 27, 1991) (Wilkinson, J.), where the court held that the state court's resolution of a close legal question "warrants respect from a federal habeas

reasonable difference in opinion as to the proper legal standard, *Saffle* and *Butler* make clear that the habeas petitioner is seeking a new rule; and *Teague* held that claims seeking to establish new rules are not cognizable in habeas. Of course, there may be instances in which state courts refuse to recognize established law—that is, act unreasonably or in bad faith—and under *Teague* and its progeny federal habeas corpus is available to correct and deter such errors. The result of these developments, as Justice Brennan correctly stated, is that a federal habeas court "must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable." *Butler*, 494 U.S. at 422 (Brennan, J., dissenting).⁴

court as one that reasonable jurists could make." Slip op. 10. The court recognized that mere disagreement with the state court's legal judgment would entail creation of a new rule under *Butler*, and therefore refused to consider the habeas petitioner's claim. *Id.* at 5. Indeed, even the dissent in *Bunch* did not dispute that a federal habeas court is bound to defer to reasonable state court legal judgments, but argued that the law was too clear to admit of reasonable dispute. *Id.* at 23 (Sprouse, J., dissenting).

⁴ See also *Butler*, 494 U.S. at 417-418 (Brennan, J., dissenting) ("A legal ruling sought by a federal habeas petitioner is now deemed 'new' as long as the correctness of the rule, based on precedent existing when the petitioner's conviction became final, is susceptible to debate among reasonable minds. Put another way, a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was so clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist.") (citation and internal punctuation removed).

B. Factual Findings In State Criminal Proceedings Are Presumed To Be Correct In Subsequent Federal Habeas Corpus Proceedings

As to findings of fact, Congress has specifically provided that state court factual determinations are "presumed to be correct" in federal habeas, subject to eight exceptions that generally go to ensuring that the state court fully and fairly adjudicated the habeas petitioner's federal claim. 28 U.S.C. 2254(d); see also *Townsend v. Sain*, 372 U.S. 293 (1963). In instances in which one of the statutory exceptions applies, a federal district court on habeas review may conduct an evidentiary hearing. State court factual findings are, however, generally conclusive. See, e.g., *Sumner v. Mata*, 449 U.S. 539 (1981).

C. As A Result Of *Teague* And Section 2254(d), Current Doctrine Presents The Incongruous Situation That The Only Issues Effectively Subject To De Novo Review On Federal Habeas Corpus Are Mixed Questions Of Law And Fact

Prior to the rule established by *Teague*, *Butler*, and *Saffle*, this Court often treated mixed questions of law and fact as subject to independent review in federal habeas corpus. See, e.g., *Miller v. Fenton*, 474 U.S. 104, 112-118 (1985); *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 341-342 (1980); *Brewer v. Williams*, 430 U.S. 387, 403-404 (1977); *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961); *Townsend v. Sain*, 372 U.S. at 309 n.6, 318; *Brown v. Allen*, 344 U.S. 443, 507-508 (1953) (opinion of Frankfurter, J.). Subsequent developments in the law have fatally undermined the legal premises of that pre-*Teague* rule. As matters presently stand, only unreasonable state court inter-

pretations of *law* are subject to habeas review, and state court determinations of *fact* are ordinarily conclusive. It is accordingly incongruous that state court application of settled law to historical fact should be subject to independent review in federal habeas. Nothing in reason or experience suggests that federal habeas review of mixed questions of law and fact should be more searching than review of pure questions of law.

1. Our Proposed Harmonization Of The Standard Of Review Would Fully Serve The Purposes Of Habeas Corpus, And Would Avoid The Dilution Of *Teague* That Will Inevitably Result If The Current Incongruous Situation Is Maintained

In determining the scope of habeas corpus review, the Court has stated that the purposes of the writ must be considered in conjunction with interests in finality and comity. *Teague*, 489 U.S. at 308 (plurality opinion); *Coleman v. Thompson*, 111 S. Ct. at 2554; see also *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion). In adopting the doctrine that "new rules" are not cognizable in habeas, the Court recognized that the purposes informing habeas—giving due latitude to countervailing interests in finality and comity—are fully served if federal oversight of state court legal interpretations is limited to determining that the state court acted reasonably and in good faith. Moreover, this is so even if the state court is later proved to have been wrong.⁵ In terms of the underlying functions of

⁵ Under *Teague* and the cases applying it, a state court's interpretation of federal law that is later shown to be erroneous nonetheless is not supplanted in a federal habeas proceeding as long as the state court's interpretation reflects a reasonable, good faith construction of the law. It necessarily

habeas corpus, no meaningful distinction can be drawn between state court interpretations of existing law and application of that law to the facts of a particular case.

Just as a reasonable, good faith interpretation of the Constitution by a state court may be wrong (but nonetheless is not cognizable on habeas because the interpretation showing the state court's view to be wrong would constitute a new rule) so, too, a reasonable, good faith application of law to fact in light of the prevailing legal standards at the time of the conviction is similarly deserving of deference. Habeas corpus must serve the important purpose of policing and deterring unconstitutional state court criminal convictions, but, for the reasons set forth in *Teague* and its progeny, that purpose is fully served—and the costs of habeas are minimized—by a habeas standard that defers to reasonable, good faith application of law to facts by the state courts.

There is no reason to think that deferential review of state court determinations of mixed questions of law and fact will undermine the deterrent purposes of habeas. A state court that has acted reasonably and in good faith cannot be expected to do more; such a court will not be prompted to act differently by the prospect that a federal habeas court years down the road will overturn its judgment regarding the legal import of the facts before it. Cf. *United States v. Leon*, 468 U.S. 897, 918-919 (1984) (the exclusionary rule cannot be expected to deter objectively reasonable law enforcement activity). Moreover, any suggestion that the state courts do not endeavor con-

follows that, under *Teague*, the purposes of habeas corpus are fully served if the federal courts ensure that state criminal proceedings are conducted reasonably and in good faith.

scientiously to apply constitutional law to the facts before them is “premised on a skepticism of state courts” that this Court has roundly condemned. *Sawyer v. Smith*, 110 S. Ct. at 2831. See also Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 272 (1985) (“The premise that state courts are to be suspected of distorted factfinding and law application is disquieting. After all, the Constitution presupposes that the state courts will enforce declared federal law fairly.”).

Since this Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), Fourth Amendment claims—which involve application of law to facts—have been categorically excluded from habeas review so long as an opportunity for full and fair adjudication of the claim was afforded at the state level. The Court took this step in recognition of the fact that a contrary rule would not appreciably further the underlying purposes of habeas corpus review, including its deterrence function, and therefore could not be justified in light of the significant costs associated with habeas review generally. See also *Duckworth v. Eagan*, 492 U.S. 195, 205-214 (1989) (O'Connor, J., concurring) (arguing that *Stone* rule should apply to *Miranda* claims). Nothing suggests that limiting federal court oversight of state court treatment of Fourth Amendment claims to direct review has caused the state courts to be any less vigilant in discharging their duty to uphold the Fourth Amendment.

The standard of review we advocate also has the considerable virtue of workability. As this Court has recognized, it is often difficult to discern the line between mixed questions of law and fact and pure questions of law. *Miller v. Fenton*, 474 U.S. 104, 113 (1985). In *Miller*, the Court acknowledged that it

"has not charted an entirely clear course in this area," and that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Id.* at 113. Moreover, "much of the difficulty in this area stems from the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis." *Id.* at 113-114. On the facts in *Miller*, the Court thus focused upon which judicial actor was best positioned to make the judgment in question. *Id.* at 114.⁶

As a result of *Teague*, the determination whether a habeas petition presents a mixed question of law and fact or a purely legal question is crucial.⁷ It is

⁶ In *Miller*, the Court concluded that the mixed question of law and fact at issue (whether a confession was involuntary) was subject to independent federal review in habeas corpus. 474 U.S. at 112. This stemmed from the Court's belief that the federal courts were as well situated as the state courts to make the determination, and the Court's view that federal oversight in this area has "traditionally played an important parallel role" in protecting constitutional rights. *Id.* at 117-118. The underlying premise of *Miller*—that federal courts review legal questions on a de novo basis—has, as we have shown, changed as a result of *Teague*, *Butler*, and *Saffie*. It would be incongruous to require federal courts to defer to state court legal conclusions (judgments that the federal courts are undoubtedly as capable as the state courts to make), but to subject state court application of law to facts to de novo review.

⁷ Prior to *Teague*, the distinction between a factual question and a mixed question was similarly important. If a question was found to be factual, the state court resolution was entitled to Section 2254(d) deference; if it was found to be legal, independent federal habeas review was the rule. As this Court has recognized, this resulted in questionable con-

entirely predictable that habeas petitioners with claims that in reality seek a new rule will now couch those claims in terms that purport to seek application of settled law to the specific facts of their cases. Applying a different standard of review to so-called mixed questions of law and fact would thus facilitate end-runs around *Teague* and its progeny. Habeas claims that, in truth, rest upon a call for expansion of the law will be recast as claims regarding the sufficiency of the evidence, or as claims going to the "fundamental fairness" of the trial or penalty phase. See *Jackson v. Virginia*, 443 U.S. 307 (1979); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (outside of any specific constitutional guarantee criminal trial may be so fundamentally unfair as to constitute a denial of due process).

This case vividly demonstrates the danger. Respondent's real quarrel is with the common law inference that one in possession of recently stolen goods who fails to explain, or falsely explains, his possession is responsible for the theft of those goods. The lower court's opinion roundly criticizes the common law inference as out of touch with modern reality. See Pet. App. 11-13. Yet because *Teague* forecloses a frontal assault on the inference through the creation of a new rule on habeas corpus, respondent and the court below recast his claim as one going to the sufficiency of the evidence under *Jackson*. This practice will surely be repeated in other habeas cases unless

tortions of mixed questions into the factual or legal rubric, depending upon the context. See *Miller v. Fenton*, 474 U.S. at 112-113 (gathering examples); see also P. Bator, D. Meltzer, P. Mishkin, D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1565-1566 (3d ed. 1988) (same).

the standards of review under *Teague*, Section 2254(d), and the mixed question cases are harmonized.⁸

2. *Teague And Its Progeny Undermined The Premises Underlying The Current Treatment Of Mixed Questions Of Law And Fact*

We recognize that the doctrine we are proposing is inconsistent with this Court's pre-*Teague* statements concerning mixed questions of law and fact on habeas corpus review. We believe, however, that the tension is produced by the anomalous nature of those decisions in light of this Court's recent habeas corpus decisions. In short, the underlying premises for de novo review of mixed questions have been undermined by *Teague* and its progeny.

Of particular relevance is *Jackson v. Virginia*, 443 U.S. 307 (1979). There, the Court held that the standard of review for a federal habeas court con-

⁸ Maintaining a different and less stringent standard for so-called mixed questions of law and fact thus carries the danger of encouraging abuse and nullifying this Court's decision in *Teague*. *Teague* and its progeny responded in part to a growing problem of repetitive and abusive habeas corpus filings, particularly in capital cases. See, e.g., *Delo v. Stokes*, 110 S. Ct. 1880 (1990) (fourth federal habeas corpus petition filed within days of date set for execution). Before *Teague*, prisoners would often dress old claims in the guise of recent decisions of this Court—circumventing procedural default and abuse of the writ doctrines by contending that their claims were based on “new law” previously unavailable to them. *Teague*'s holding that retroactivity is a threshold question and its conclusion that “a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final,” 489 U.S. at 301 (plurality opinion), together constitute a substantial barrier to abusive filings. That barrier will be worth little if it can be circumvented by the simple expedient of labelling a claim a mixed question.

sidering a challenge to the sufficiency of the evidence supporting a state conviction is whether, viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.* at 318-319. In making that judgment, the *Jackson* Court stated, a federal habeas court “has a duty to assess the historical facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court.” *Id.* at 318. The Court equated the standard of review of a criminal conviction on *direct* review with that on *collateral* review. *Ibid.*

In our view, the premises underlying *Jackson* no longer obtain.⁹ First, *Teague*, *Butler*, and *Saffle* mean that even purely legal determinations are subject to deferential review, limited to determining whether the state court acted reasonably and in good faith. Moreover, the Court in *Jackson* viewed a federal court's role in a habeas corpus proceeding as no different from that undertaken in direct appeal from either a federal or state criminal conviction. See 443 U.S. at 317-318. Thus, the Court relied upon federal criminal cases and cases on direct appeal as support for the application of the same sufficiency of the evidence standard in habeas corpus and on direct review. *Id.* at 318. Indeed, the Court noted the practice of the federal courts independently to assess the facts supporting a criminal conviction on direct review, and explicitly stated that “[t]he same duty obtains in a federal habeas corpus proceeding.” *Ibid.*

⁹ We do not question *Jackson*'s substantive standard for determining whether evidence was sufficient to support a criminal conviction, but only the standard of review for applying it in federal habeas corpus.

This Court's decisions since *Jackson* have emphatically rejected any analogy between habeas corpus review of state judgments and review on direct appeal. The Court's adoption of Justice Harlan's approach to retroactivity in *Teague* was itself premised upon a recognition that a criminal conviction becomes final after a direct appeal, and that a habeas proceeding is a subsequent and separate action, in which different legal standards should apply. Habeas corpus is "a collateral remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review." *Teague*, 489 U.S. at 306 (plurality opinion), quoting *Mackey v. United States*, 401 U.S. at 682-683 (separate opinion of Harlan, J.). See also *United States v. Frady*, 456 U.S. 152, 165 (1982) ("we have long and consistently affirmed that a collateral challenge may not do service for an appeal").

Thus, in *Teague* the Court approached the question of retroactivity on habeas corpus, not by reference to direct appeal, but by analysis of the "nature, function, and scope of" habeas corpus. 489 U.S. at 306 (plurality opinion), quoting *Mackey*, 401 U.S. at 682 (separate opinion of Harlan, J.). This inquiry, which should be the basis for analyzing the proper standard of review in this case, was not one that the Court undertook in *Jackson*. After *Teague*, the "nature, function, and scope" of habeas corpus indicates that deference to state court application of law to facts is appropriate. It serves no function, and imposes great costs on the federal system, when federal habeas review results in invalidation of a ten-year old state criminal conviction based on mere disagreement over what is concededly a "judgment" call.

Apart from its decision in *Jackson v. Virginia*, this Court has elsewhere treated mixed questions of law

and fact as subject to de novo review in habeas corpus proceedings. See *Miller v. Fenton*, 474 U.S. 104 (1985); *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 341-342 (1980); *Brewer v. Williams*, 430 U.S. 387, 403-404 (1977); *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961); *Brown v. Allen*, 344 U.S. 443, 507-508 (1953) (opinion of Frankfurter, J.).¹⁰ In our view, although there is no reason to question the substantive standards established by these cases, the underlying legal premise for the rule that the scope of review of mixed questions is de novo has been undermined by this Court's decisions in *Teague*, *Butler*, and *Saffle*. For the reasons we have stated, the values of consistency and workability, as well as the fundamental function of habeas corpus in our federal system, would be best served by affording deference to reasonable, good faith state court application of law to facts in criminal proceedings.

Adoption of this rule is needed in order to bring the law into line with *Teague* and its progeny. This Court has recognized that it has not "always followed an unwavering line in its conclusions as to the availability of the Great Writ. [The] development of

¹⁰ Since *Teague* and the cases applying it were decided, this Court has on occasion considered habeas corpus claims based on application of settled law to historic facts, and has not questioned that the proper standard of review is de novo. See, e.g., *Lewis v. Jeffers*, 110 S. Ct. 3092, 3102-3104 (1990) (reviewing state appellate court factual findings under the *Jackson v. Virginia* standard and determining that the state court's application of law to fact was rational); *Estelle v. McGuire*, 112 S. Ct. 475 (1991) (rejecting claim that admission of certain evidence at a state criminal trial violated due process). The question of the proper standard of review was not, however, briefed or argued in either case.

the law of federal habeas corpus has been attended, seemingly, with some backing and filling." *Teague*, 489 U.S. at 308 (plurality opinion), quoting *Fay v. Noia*, 372 U.S. 391, 411-412 (1963). See also *Stone v. Powell*, 428 U.S. at 474-482. As Justice O'Connor has noted, "the Court has long recognized that habeas corpus has been traditionally regarded as governed by equitable principles * * * and thus has long defined the scope of the writ by reference to a balancing of state and federal interests." *Duckworth v. Eagan*, 492 U.S. at 213 (O'Connor, J., concurring) (internal quote and citation removed). See also *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (plurality opinion); *Rose v. Lundy*, 455 U.S. 509, 546-548 (1982) (Stevens, J., dissenting).

II. IN THIS CASE, THE STATE COURTS ACTED REASONABLY AND IN GOOD FAITH IN REJECTING RESPONDENT'S SUFFICIENCY OF THE EVIDENCE CLAIM

Applying a rule of deference to reasonable state court treatment of mixed questions of law and fact, the outcome in this case is clear. Here, a federal appellate court reviewed a state record more than ten years after the state judgment became final, and concluded that a unanimous jury of twelve citizens of the Commonwealth of Virginia acted irrationally. The court further decided that a state trial and appellate court (not to mention a federal district court) were incorrect in concluding that a rational fact finder could conclude that the evidence against respondent established his guilt beyond a reasonable doubt.

The court of appeals did not question that the proper legal standard was applied at all levels of the state proceedings. The court of appeals recognized

that it was making a "judgment" call, but it concluded that the jury was *irrational* in inferring that respondent's false explanation of where he obtained the goods in question indicated that he had stolen them. Although the court of appeals recognized that the jury disbelieved respondent's explanation, it ignored the probative force of the conclusion that necessarily follows from that disbelief—that respondent committed perjury in explaining how he came to possess the goods in question. It was not irrational for the jury to infer from respondent's perjury that he in fact stole those goods. See, *e.g.*, *United States v. Restrepo-Contreras*, 942 F.2d 96, 99 (1st Cir. 1991) (jury entitled to treat incredible testimony as evidence of guilt), cert. denied, No. 91-6502 (Jan. 21, 1992).

Thus, there is no basis on which to conclude that the state courts acted unreasonably or in bad faith in determining that the evidence against respondent was sufficient to support his conviction. Indeed, what happened in this case demonstrates the need for the rule of deference that we advocate. There is no reason that the Fourth Circuit, ten years after the fact, was better situated than the state courts to make the necessary judgment call.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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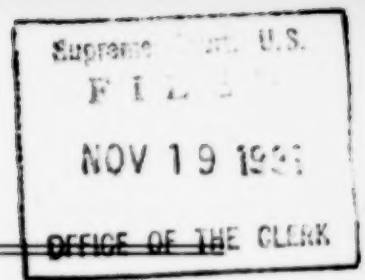
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FEBRUARY 1992

Case No. 91-542



IN THE
Supreme Court of the United States

October Term, 1991

ELLIS B. WRIGHT, JR., WARDEN, *et al.*,
Petitioners,

v.

FRANK ROBERT WEST, JR.,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

**BRIEF OF AMICUS CURIAE IN SUPPORT OF
PETITIONER***

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*The States joining in this brief are listed in the Appendix to this pleading.

QUESTIONS PRESENTED

The questions presented by Petitioner, Ellis B. Wright, Jr., are as follows:

I. May a federal court grant collateral relief merely because it disagrees with the good faith reasonable decision of the state courts?

II. May a federal court fundamentally alter the standard established by this Court in *Jackson v. Virginia* and vacate a state conviction on the basis of nothing more than "concern" about a deeply-rooted common law principle that the prisoner never raised in state court?

This brief addresses an aspect of question II.

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INTEREST OF AMICUS CURIAE

The States joined herein as amicus curiae urge this Court to grant certiorari and quash the decision of the United States Court Appeals for the Fourth Circuit below, *West v. Wright*, 931 F.2d 262 (4th Cir.1991). In such decision, the federal court, in granting habeas corpus relief to a state prisoner convicted of larceny, cast doubt upon the continuing vitality of that common-law presumption arising from a defendant's possession of recently stolen property.

As will be demonstrated *infra*, the vast majority of jurisdictions throughout this country continue to apply this presumption or inference, and the *West* court's suggestion that this doctrine has been at all discredited or discarded is not accurate. The Fourth Circuit's intrusion into matters of state law and policy is both unwarranted and unwise, and is of great concern to the States joined herein. Accordingly, amicus urge this Court to grant the petition for review, filed on behalf of the State of Virginia.

ARGUMENT

In the decision at bar, *West v. Wright*, 931 F.2d 262 (4th Cir.1991), the United States Court of Appeals for the Fourth Circuit ordered the granting of habeas corpus relief to a Virginia prisoner, convicted of grand larceny. The court ostensibly reached this result, by examining the sufficiency of the evidence under the standards set forth by this Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). In the course of reaching this result, however, the Fourth Circuit felt compelled to suggest that "a number of federal and states courts" have come to express "discomfort" with the common-law presumption or inference arising from a defendant's possession of recently stolen goods, *i.e.*, that the possessor was a participant in the theft. The Fourth Circuit also maintained that these "federal and state courts" have refused "to countenance further use of the inference as the sole basis for conviction under any circumstance." *West*, 931 F.2d at 267.

The States joined herein as amicus take strong issue with the accuracy of the above statements, and would further maintain that, even if, in fact, this common-law presumption is at all deserving of revision or reconsideration, such action should unquestionably be taken directly by the legislatures and courts of the sovereign states of this nation, and not unilaterally by a federal court of appeals in the context of action upon an individual habeas corpus petition.

In the *West* opinion itself, the Fourth Circuit acknowledges that, "from earliest times," there has existed an inference that one found in possession of recently stolen property was a participant in the theft. *West*, 931 F.2d at 267. Nevertheless, citing primarily to one Pennsylvania decision, the federal court of appeals somehow concludes that the "basic premise of the inference" has been rendered obsolete by "intervening technological and demographic

developments," such that its use has been "severely constrained." *Id.* The Fourth Circuit, without any great enthusiasm, grudgingly concedes that no court has yet rejected the inference "on constitutional due process grounds," but, as noted above, represents that no court, especially in light of *Jackson v. Virginia*, would now uphold a larceny conviction premised solely upon this inference. *Id.*

The Fourth Circuit is simply in error. In fact, at least the following ten (10) jurisdictions have specifically held that evidence of a defendant's possession of recently stolen property, and the inference or presumption arising therefrom, is sufficient to justify denial of a defendant's motion for directed verdict and to allow the jury to resolve the matter of the defendant's guilt or innocence of larceny. See *e.g.*, *Ward v. State*, 280 Ark. 353, 658 S.W.2d 379 (1983) (defendant's possession of recently stolen goods *prima facie* evidence of guilt, and sufficient to sustain conviction); *Winborne v. State*, 455 A.2d 357 (Del.1982) (defendant's possession of recently stolen goods sufficient to sustain conviction of burglary and theft); *State v. Hong*, 62 Haw. 83, 611 P.2d 595 (1980) (defendant's exclusive possession of recently stolen goods sufficient to sustain conviction, if unexplained); *Miller v. State*, 563 N.E.2d 578 (Ind.1990); (defendant's unexplained possession of recently stolen goods supports inference of guilt of theft of that property and is sufficient to sustain conviction); *State v. McFall*, 219 Kan. 798, 549 P.2d 559 (1976) (defendant's possession of recently stolen property sufficient to sustain conviction of theft, where satisfactory explanation not given); *Jackson v. Commonwealth*, 670 S.W.2d 828 (Ky.1984), *cert. denied*, 469 U.S. 1111 (1985) (possession of recently stolen property is *prima facie* evidence of guilt of theft of that property, sufficient to sustain conviction); *State v. Brown*, 744 S.W.2d 809 (Mo.1988) (defendant's unexplained possession of recently stolen property sufficient to support submission of case to jury); *State v. Odom*, 99 N.C.App. 265, 393 S.E.2d 146 (1990)

(denial of defendant's motion to dismiss larceny charge at close of all evidence proper, where state relied upon presumption arising from defendant's possession of recently stolen property); *State v. Deubler*, 343 N.W.2d 380 (S.D.1984) (possession of recently stolen property a circumstance from which guilt of theft may be presumed; fact of such possession alone, if unexplained, sufficient circumstance upon which to rest verdict of guilty); *Sutherlin v. State*, 682 S.W.2d 546 (Tex.Crim.App.1984) (en banc) (unexplained possession of recently stolen property is sufficient circumstance, in and of itself, to convict possessor of the theft of that property).¹

Obviously, the holdings of these cases are irreconcilable with that of *West v. Wright*, and the Fourth Circuit's assumption that no state court would affirm a conviction of larceny based solely upon evidence of a defendant's possession of recently stolen property, and the presumption or inference arising therefrom, is clearly erroneous. The potential for further conflict on this issue is clear, in that, should those convicted of larceny in the above-cited jurisdictions challenge the sufficiency of evidence supporting their convictions on federal habeas corpus, the federal court presiding over the case may, in derogation of the above precedents,

1 Additionally, in Utah, § 76-6-402(1), Utah Code Ann. (1990), specifically provides that the unexplained possession of recently stolen property shall be deemed *prima facie* evidence that the person in possession of that property stole it; although the Utah Supreme Court has held that the jury should not be expressly instructed as to this presumption, it would appear that this inference may remain sufficient to support a conviction. See e.g., *State v. Chambers*, 709 P.2d 321, 326-7 (Utah 1985); *State v. Graves*, 717 P.2d 717 (Utah 1986). Further, Maine provides by statute that proof that the defendant was in possession of recently stolen property gives rise to the presumption that the defendant is guilty of theft of that property, see *Me. Rev. Stat. Ann.*, § 17-A 361(2)(1983), *State v. Robinson*, 561 A.2d 492 (Me.1989), and Arizona similarly provides that proof of possession of recently stolen property, unless satisfactorily explained, may give rise to an inference that the person in possession of that property participated in the theft. See *Ariz. Rev. Stat. Ann.*, § 13-2305(1)(1987).

choose to follow the *West* analysis. Accordingly, the States joined herein as amicus curiae urge this court to grant Virginia's petition for review.

It is not, however, simply the jurisdictions set forth above who are affected by the holding of *West v. Wright*. The Fourth Circuit's condemnation of this common-law presumption has truly nationwide consequences, in that practically all jurisdictions in this country utilize the common-law presumption or inference arising from possession of recently stolen property. Cases discussing the rationale for the presumption are truly legion, and one of the most concise discussions is contained in *People v. Shurn*, 69 A.D. 2d 64, 418 N.Y.S. 2d 445, 448-9, (A.D. 2 Dept. 1979):

The inference to be drawn from the recent and exclusive possession of stolen goods is one of the oldest means of proving identity known to Anglo-American jurisprudence, dating back at least to the seventh century (see *Barnes v. United State*, 412 U.S. 837, 844 n.5, 93 S.Ct. 2357, 37 L.Ed.2d 380). Its roots in the common law arise from ordinary common sense and practical necessity. Because larceny, among other crimes, is often committed under covert circumstances, direct evidence of the identity of the thief is frequently unavailable to the prosecution (citation omitted). The law fills this void with the common sense view that an innocent man is generally not in the exclusive possession of stolen property soon after the commission of the crime, and it therefore permits an inference that the possessor is the thief.

The fact that many states have, in certain respects, modified this inference, or, at times, required the existence of additional corroborating evidence in order to sustain a conviction, is not a sign of weakness, as the *West* court would

have it, but rather, one of strength. As this Court noted in *Barnes v. United States*, 412 U.S. 837, 845, n.5 (1973), this common-law presumption derives from the laws of pre-Norman England, and it is hardly surprising that, over the centuries, the respective states throughout this nation have, in certain respects, revised the inference, such that its continued usage is consistent with the requirements of due process.

Given the fact that at least the following twenty-four (24) jurisdictions, in addition to those thirteen (13) cited previously, continue to employ, as a permissive inference, this principle of law, the Fourth Circuit's declaration of its demise would seem to have been greatly exaggerated. See e.g. *Prock v. State*, 471 So.2d 519 (Ala.Crim.App.1985); *State v. Anonymous*, (83-FG), 190 Conn. 715, 463 A.2d 533 (1983); *Scobee v. State*, 488 So.2d 595 (Fla.1st DCA 1986); *Dearmore v. State*, 196 Ga.App. 864, 397 S.E.2d 200 (1990); *State v. Hoffman*, 190 Idaho 127, 705 P.2d 1082 (Idaho Ct.App.1985); *People v. Tyson*, 137 Ill.App.3rd 912, 485 N.E.2d 523 (Ill.App.2 Dist.1985); *State v. Hall*, 371 N.W.2d 187 (Iowa Ct.App.1985); *Grant v. State*, 318 Md. 672, 569 A.2d 1237 (1990); *Commonwealth v. Wilbur*, 353 Mass. 376, 231 N.E.2d 919 (1967), cert. denied, 390 U.S. 1010 (1968); *People v. Miller*, 141 Mich.App. 637, 367 N.W.2d 892 (1985); *State v. Ferraro*, 290 N.W.2d 177 (Minn.1980); *Weaver v. State*, 481 So.2d 832 (Miss.1985); *State v. Kramp*, 200 Mont. 383, 651 P.2d 614 (1982); *Gibson v. State*, 96 Nev. 48, 604 P.2d 814 (1980); *State v. Thomas*, 103 N.J. Super. 154, 246 A.2d 746 (1968); *People v. Angel*, 158 A.D.2d 145, 558 N.Y.S.2d 489 (A.D. 1 Dept.1990), appeal denied, 77 N.Y.2d 836, 567 N.Y.S.2d 204, 568 N.E.2d 653 (N.Y.1991); *State v. Hogie*, 454 N.W.2d 501 (N.D.1990); *State v. Wilson*, 21 Ohio App.3rd 171, 486 N.E.2d 1242 (1985); *State v. Land*, 681 S.W.2d 589 (Tenn.Cr.App.1984); *State v. Beyer*, 129 Vt. 472, 282 A.2d 819 (1971); *Crews v. Commonwealth*, 3 Va.App. 531, 352 S.E.2d 1 (1987); *State v. Craft*, 165 W.Va. 741, 272 S.E.2d 746 (1980);

State v. Williams, 104 Wis.2d 15, 310 N.W.2d 601 (1981); *Jennings v. State*, 806 P.2d 1299 (Wyo.1991).

In light of this solid line of precedent, the States joined herein as amicus would urge this Court to grant certiorari, so that the continuing vitality of this common-law presumption may be vindicated. As suggested previously, the Fourth Circuit's condemnation of this principle of law was unnecessary and unjustified, and can be said to have cast a cloud over larceny prosecutions nationwide. A legal principle which is so consistently applied in so many state court jurisdictions cannot be unilaterally abolished at the hands of a federal court of appeals, unmindful of the constraints of comity. The "growing discontent" perceived by the federal court in *West* relates not to the states' unease with the common-law presumption relating to the possession of stolen property, but, rather, to the states' understandable frustration with a federal court's presumptuous rule-making. Cf. *Engle v. Isaac*, 456 U.S. 107, 128-9, n.33 (1982). Like this Court's recent decision, *Coleman v. Thompson*, 500 ___ U.S. ___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1990), this is a case about federalism, and concerns the respect that federal courts owe the states. In light of the actions of the federal court *sub judice*, the States joined herein as amicus have no recourse but to ask this Court to intervene and the redress the balance in our federal system.

CONCLUSION

The States joined herein as amicus curiae urge this Honorable Court to grant the petition for writ of certiorari filed on behalf of the State of Virginia.

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APPENDIX

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No. 91-542

Supreme Court, U.S.
FILED
JAN 30 1992
OFFICE OF THE CLERK

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**BRIEF OF AMICUS CURIAE ON THE MERITS IN
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QUESTIONS PRESENTED

The Petitioner presented the following questions:

I. May a federal court grant collateral relief merely because it disagrees with the good faith reasonable decision of the state courts?

II. May a federal court fundamentally alter the standard established by this Court in *Jackson v. Virginia* and vacate a state conviction on the basis of nothing more than "concern" about a deeply-rooted common law principle that the prisoner never raised in state court?

This Court, in granting certiorari, added the following:

In determining whether to grant a petition for writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?

This brief addresses the latter question.

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INTEREST OF AMICUS CURIAE

The States joined herein as amicus curiae urge this Court to quash the ruling of the United States Court of Appeals for the Fourth Circuit, *West v. Wright*, 931 F.2d 262 (4th Cir.1991). This case presents an important vehicle for this Court to clarify the proper role of a federal court in reviewing, through habeas corpus, the convictions of state prisoners. This Court, in granting certiorari, directed that the parties address an additional question — whether, in passing upon a petition for writ of habeas corpus filed by a prisoner in state custody, a federal court should give deference to the state court's application of law to the specific facts of the petitioner's case or whether *de novo* review should be performed. The states joined herein strongly urge that deference should be given to state court applications of law, and, inasmuch as the question presented literally cuts to the heart of our federal system, the States' interest in the proper resolution of this matter should be beyond dispute.

SUMMARY OF ARGUMENT

The decision of the Fourth Circuit at bar is fundamentally at odds with *Jackson v. Virginia*, 443 U.S. 307 (1979), in which this Court set forth the standards that a federal court should employ in resolving, on habeas corpus, a state prisoner's attack upon the sufficiency of the evidence supporting his conviction. The Fourth Circuit's misapprehension of this Court's precedent, however, does not represent an isolated error, and, in fact, validates the concerns expressed by the three members of this Court, who, in a concurring opinion of *Jackson*, warned of the dangers of allowing this type of intrusive federal review of matters which unquestionably should be left to the States.

This Court, as evidenced by the question added upon granting of certiorari, is plainly concerned as to the respective roles of state and federal courts in the review of state convictions. State court determinations of fact have, of course, been accorded deference under 28 U.S.C. § 2254, whereas those of law have not. This distinction, however, as the Court itself has acknowledged, is often an elusive concept, and would, in any event, seem outdated by the growing expertise of state courts in the resolution of all legal matters presented to them, whether grounded in the state or federal Constitution. This Court, in the recent decision, *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822, 2831 (1990), recognized that the courts of the States are, in fact, "coequal parts" of the national judicial system. It is, thus, only fitting that this Court confer true equality upon the States, and in accordance with a number of recent decisions, explicitly declare that, when a state court has afforded a prisoner an opportunity for a full and fair hearing upon his constitutional claim, and where the state courts' resolution of that claim does not represent one which no reasonable court could reach, federal habeas review is inappropriate unless to correct what would amount to "an extreme malfunction in the state criminal justice system." *Jackson*, 443 U.S. 326, 332, n.5 (Stevens, J., concurring).

ARGUMENT

WHEN A FEDERAL COURT DETERMINES WHETHER TO GRANT A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT, DEFERENCE SHOULD BE GIVEN TO THE STATE COURT'S APPLICATION OF LAW TO THE SPECIFIC FACTS OF THE PETITIONER'S CASE.

In the case at bar, the Fourth Circuit, in essence, reversed a twelve year old Virginia conviction because, *inter alia*, it reweighed the evidence, including the demeanor of the defendant, and disagreed with the applicable Virginia law. Despite the court of appeals' purported attempts to comply with the Court's precedent, *Jackson v. Virginia*, 443 U.S. 307 (1979), it should be beyond dispute that the court did nothing of the kind. *Cf. Jackson*, 443 U.S. at 325, n.16 (in resolving sufficiency of evidence claim, federal court must apply standard "with explicit reference to the substantive elements of the criminal offense as defined by state law.") This case, however, has obvious implications beyond whether, as a matter of fact, Frank Robert West, Jr. stole the goods in question, or, for that matter, whether the decision below represents a misapplication of *Jackson*. In granting certiorari, this Court, plainly concerned by similar abuses, directed the parties to brief an additional question — whether a federal court should give deference to a state court's application of law to the specific facts of a state court petitioner's case or whether *de novo* review should be performed. The States joined herein as amicus urge that deference should in fact be given to state court applications of law, and that in expressly reaching such holding, this Court can not help but to properly accommodate the States' interest in comity and finality.

While this Court, in *Jackson*, held that federal courts could, on habeas corpus, review the sufficiency of evidence in support of a state prisoner's conviction, this result was not reached by unanimous consent. Justice Stevens in his concurring opinion, which was joined by then Chief Justice Burger and then Justice Rehnquist, stated prophetically:

The federal district courts are therefore being directed to simply duplicate the reviewing function that is now being performed adequately by state appellate courts. In my view, this task may well be inconsistent with the prohibition — added by Congress to the federal habeas statute in order to forestall undue federal interference with the state proceedings, see *Wainwright v. Sykes*, 433 U.S. 72, 80, 97 S.Ct. 2497, 2503, 53 L.Ed.2d 594 — against overturning 'a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction.' 28 U.S.C. § 2254(d). See *La Vallee v. Delle Rose*, 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed.2d 637. In any case, to assign a single federal district judge the responsibility of directly reviewing, and inevitably supervising, the most routine work of the highest courts of a State can only undermine the morale and the esteem of the state judiciary — particularly when the stated purpose of the additional layer of review is to determine whether the State fact-finder is 'rational'. (footnote omitted) Such consequences are intangible but nonetheless significant.

Jackson, 443 U.S. at 336 (Stevens, J., concurring in judgment).

The concurring opinion, which likewise cited to such authoritative treatises as Bartels, *Avoiding a Comity of Errors*, 29 Stan.L.Rev.27 (1976) and Bator, *Finality in*

Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv.L.Rev.441 (1963), also noted that the traditional justifications for federal review of state proceedings — that federal judges have special expertise and that they are less susceptible to political pressures than their peers on the state bench — were particularly lacking in the context of sufficiency of the evidence claims, and, would seem to have agreed with Virginia that application of the *Stone v. Powell* rationale was appropriate. *Id.* at 336-7, n.9. The concurrence's conclusion was that the cost of allowing this type of "duplicative" federal review, in terms of finality and comity, was simply not justified.

Justice Stevens was correct, and the instant decision of the Fourth Circuit is living proof. Obviously, any federal review of a state conviction represents an intrusion, which, inevitably, leads to friction between the two sovereigns. Cf. *Engle v. Isaac*, 456 U.S. 107, 129 (1982) ("Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights."); *Sumner v. Mata*, 449 U.S. 548, 551 (1981) ("A writ issued at the behest of a petitioner under 28 U.S.C. § 2254 is in effect overturning either the factual or legal conclusions reached by the state-court system under the judgment of which the petitioner stands convicted, and friction is a likely result."). This type of intrusion is particularly unwarranted when, as here, the federal court is asked to review a state court's application of its own law to the facts before it. Cf. *Estelle v. McGuire*, ___ U.S. ___, 112 S.Ct. 475, 480 (1991) ("...we reemphasize that it is not the province of a federal habeas court to reexamine state court determinations on state law questions."). Despite whatever constitutional rubric a petitioner, or his counsel, may choose to employ, a federal habeas court which is asked to pass upon the sufficiency of the evidence in support of a state prisoner's conviction is being asked to apply state law to the state court record, no more and no less. It is difficult

to see how, or why, this *Jackson*-imposed burden can survive *McGuire*. Accordingly, the States joined herein as amicus ask this Court to explicitly hold that state court applications of law to the specific facts before them are entitled to deference in a proceeding brought under 28 U.S.C. § 2254. Such a holding would clearly have precluded the result below.

The question posed by this Court, however, does not limit itself to the deference to be paid a state court's application of state law to given facts, and, indeed, there is no good reason why the question, or this Court's consideration, should be so circumscribed. As this Court has frequently recognized, state courts are daily confronted with claims brought under the federal constitution, and state jurists have proven themselves more than capable of fairly adjudicating those matters. In *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822, 2831 (1990), this Court recently held,

Petitioner appears to contend that state courts will recognize federal constitutional protections only if they are compelled to do so by federal precedent and the threat of federal habeas review....This argument is premised upon a skepticism of state courts that we decline to endorse. State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution.

Following the rationale of the majority decision in *Stone v. Powell*, 428 U.S. 465 (1976), and the compelling concurring opinion of Justice O'Connor in *Duckworth v. Eagan*, 492 U.S. 195, 205 (1989), in which Justice Scalia also joined, it would seem more than appropriate that it be expressly recognized that state court applications of law, state and federal, to the facts of a given petitioner's case be afforded deference under § 2254. The traditional

"dividing line" between state court determinations to be afforded deference, i.e., "matters of 'fact' and matters of 'law'," was admitted to be "elusive at best" even at the time of pronouncement. See *Miller v. Fenton*, 474 U.S. 104, 114 (1985). Likewise, this Court has acknowledged that there is a certain dynamic as to the availability of the writ and that the interests of comity and finality must be considered in determining the proper scope of habeas review. See *Teague v. Lane*, 489 U.S. 288, 308 (1989) (citing, *inter alia*, *Stone v. Powell*). See also *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) ("...the Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of the crime is afforded a trial free of constitutional error.") (cited in *Teague*, 489 U.S. at 308).

All of the above being true, it truly serves no national purpose to ignore and denigrate the ability of state courts to apply and interpret law. Indeed, this Court has already held that state courts' reasonable good-faith interpretations of existing precedent should be validated. See *Butler v. McKellar*, 494 U.S. 407, 414 (1990); *Saffle v. Parks*, 494 U.S. 484, 490 (1990) (discussing reasonableness of state courts' disposition of petitioner's Eighth Amendment claim). The fact remains that the role of habeas corpus proceedings is not, and should not be, without limitation. As this Court held in *Barefoot v. Estelle*, 463 U.S. 880, 887-888 (1983),

It must be remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review — which includes the right to petition this Court for a writ of certiorari — comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited.

Federal courts are not forums in which to relitigate state trials.

See also Autry v. Estelle, 464 U.S. 1, 2-3 (1983).

Surely, even West would concede that conditions have changed since 1867, when, during Reconstruction, federal habeas corpus was made available to state prisoners, and that, even since Congress last revised habeas corpus in the 1960's, state courts have undergone dramatic change. Not only do state prisoners have post-conviction and collateral remedies available to them that literally could not have been dreamed of decades ago, but, as noted in *Sawyer*, a state prisoner can unquestionably present a federal claim to the courts of a state with the confidence that the claim will be reviewed with the same scrutiny and probity that any federal court could muster. The costs in finality and comity simply do not justify the continued treatment of state courts, on matters of law, as second-class citizens.

While Respondent West will inevitably claim that amicus seek nothing less than the total evisceration of federal habeas corpus, that is simply not the case. The States joined herein simply desire that they become truly "coequal partners" in our national judicial system, in fact as well as reputation. Federal courts should always stand ready, on habeas corpus, to "guard against extreme malfunctions in the state criminal justice system." *Jackson*, 443 U.S. at 332, n.5. (Stevens, J., concurring in judgment). But, as long as a state petitioner has been afforded an opportunity for a full and fair hearing in state court on his constitutional claim, *Cf. Stone v. Powell, supra*, and as long as the state courts' resolution of that claim does not represent a result which no reasonable court could reach, *Cf. Butler, supra, Parks, supra, de novo* federal collateral review is simply not warranted. Any other conclusion relegates the courts of the fifty states of this union to nothing more than fact-finders, or

glorified handmaidens, for the federal courts. Nothing in the Constitution, the acts of Congress or this Court's precedents mandate such a stark and inequitable conclusion. Accordingly, the States joined herein as amicus respectfully urge this Court to hold that deference should be paid to state court applications of law to the given facts of a habeas petitioner's case, and further urge this Court to quash the opinion of the Fourth Circuit below.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed, and this Court should expressly hold that, as set forth above, a federal court, in an action brought under 28 U.S.C. § 2254, must give deference to a state court's application of law to the specific facts of the case.

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No. 91-542

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October Term, 1991

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Petitioners,

v.

FRANK ROBERT WEST, JR.,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH
CIRCUIT**

**BRIEF OF AMICUS CURIAE ON THE MERITS IN
SUPPORT OF PETITIONER**

APPENDIX

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QUESTION PRESENTED

In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?

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FRANK ROBERT WEST, JR.,
Respondent.

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF THE PETITIONER**

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)¹ is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of a claim already fully and fairly litigated in the state courts. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

1. Both parties have consented in writing to the filing of this brief.

SUMMARY OF ARGUMENT

The use of habeas corpus to relitigate *de novo* claims of trial error already considered on appeal is not justified by the common law, the Constitution, or the Habeas Corpus Act of 1867. It is entirely a judicial creation of the twentieth century. Neither precedent nor legislative inaction justifies its retention.

De novo review of application of law to the facts should be reserved for truly fundamental claims, such as coerced confession, mob domination of trials, and denial of counsel. Other claims, including sufficiency of the evidence, should not be relitigated if the state courts have fairly reached a conclusion on which reasonable judges can differ.

ARGUMENT

I. The historical "Great Writ" was not an instrument of collateral attack on felony convictions.

Suggesting that habeas corpus be limited, as we will below, invariably produces a vehement reaction. "Any murmur of dissatisfaction with [collateral attack on convictions] provokes immediate incantation of the Great Writ, with the inevitable initial capitals, often accompanied by a suggestion that the objector is the sort of person who would cheerfully desecrate the Ark of the Covenant." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970). Before turning to the particular question at hand, then, it may be best to note a frequently overlooked aspect of the writ. Habeas corpus as we know it is vastly different in both purpose and function from the procedure on which Blackstone heaped his famous praise. See 3 W. Blackstone, *Commentaries* *131.

A. Common Law.

Habeas corpus earned its hallowed place in history as a judicial protection against illegal detentions by the executive.

See *id.*, at *134; see also *Brown v. Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring in the judgment). However, the principal use of habeas corpus in routine criminal cases was to review the decision to commit the accused before trial. Hale places his entire discussion of habeas corpus under the heading of bail. See 2 M. Hale, *Pleas of the Crown* 143-148 (1736). The celebrated Habeas Corpus Act of 1679, 31 Car. 2, ch. 2 was passed for the benefit of persons "committed for criminal or supposed criminal Matters" who had been denied release on bail "in such Cases where by Law they are Bailable." *Id.*, preamble. The Act's principal reform expressly excluded from its operation "Persons Convict or in Execution by legal Process." *Id.*, § 3; *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 202 (1830).

Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (1670) is often cited with vigor as authority for the proposition that habeas corpus could be used as a collateral attack. See, e.g., *Fay v. Noia*, 372 U. S. 391, 404-405 (1963), overruled on other grounds in *Coleman v. Thompson*, 115 L. Ed. 2d 640, 669, 111 S. Ct. 2546, 2565 (1991). However, *Bushell's Case* was unusual in several respects, and it was not followed for such a broad proposition.

The first and most obvious distinction was that *Bushell's Case* was a contempt proceeding and not a trial for a crime. The *Bushell* Court itself emphatically distinguishes the two situations. Vaughan, at 142-143, 124 Eng. Rep., at 1009-1010. The essential difference between the two was that a person accused of a crime had a remedy in trial by jury, *ibid.*, and the *Bushell* Court had great confidence in the English institution of jury trial.²

2. Indeed, the main point of *Bushell's Case* was preserving that institution. *Bushell* was a juror held in contempt for bringing in the "wrong" verdict. *Id.*, at 135-136.

The second distinction was that Bushell had been committed by the Court of Oyer and Terminer, which was an inferior court within the English judicial structure. In *Brass Crosby's Case*, 3 Wils. 189, 195, 95 Eng. Rep. 1005 (1771), counsel cited *Bushell's Case* to no avail. Crosby had been committed for contempt by the House of Commons, which the Court of Common Pleas considered a coordinate court for this purpose. "[T]heir adjudication is a conviction, and their commitment in consequence, is execution; and no Court can discharge or bail a person that is in execution by the judgment of any other Court." *Id.*, at 199 (emphasis added). Justice Blackstone concurred, stating "for if they have power to decide; they ought to have the power to punish: no other Court shall scan the judgment of a Superior Court." *Id.*, at 204.

King v. Suddis, 1 East 306, 102 Eng. Rep. 119 (1801) confirms that habeas was not available to collaterally attack a judgment of conviction by a competent court. Lord Chief Justice Ellenborough's comments during argument in *Burdett v. Abbott*, 14 East 1, 63-73, 104 Eng. Rep. 501 (1811) indicate that *Bushell's Case* was not read as broadly as its wording might imply.

B. Early American Cases.

In the United States, the writ of habeas corpus was a part of our heritage and was protected against suspension in the Constitution. U. S. Const. art. I, § 9. For the content of the privilege of habeas corpus, our courts looked to that common law heritage. *Ex parte Bollman*, 4 Cranch (8 U. S.) 75, 93-94 (1807). Because *Bollman* involved a pretrial writ, *id.*, at 76, the decision in that case did not involve a conflict with a judgment of another court, but only with a preliminary decision to commit. The Supreme Court's decision to go to the merits of the case *de novo*, therefore, did not conflict with the common law rule.

Ex parte Kearney, 7 Wheat. (20 U. S.) 38 (1822), on the other hand, did involve a judgment by the circuit court. Kearney had been held in contempt, and his attorney cited *Bollman* and *Bushell's Case* for the proposition that the Supreme Court

could review this decision on habeas corpus. *Id.*, at 40. Justice Story, writing for a unanimous Court, rejected the argument and followed *Brass Crosby's Case*, *supra*. 7 Wheat., at 43. The Supreme Court at that time had no jurisdiction to revise the judgment of the circuit court directly, and would not do so indirectly. *Id.*, at 42. Justice Story notes that if a conviction for a criminal offense had been under attack "it could hardly be maintained" that a court with no jurisdiction to hear an appeal from that conviction could revise it on habeas corpus. *Id.*, at 43.

That precise question arose in *Ex parte Watkins*, 3 Pet. (28 U. S.) 193 (1830). "An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous," Chief Justice Marshall wrote for a unanimous Court. *Id.*, at 203. *Watkins* distinguished *Bollman* as not involving a judgment of a court and followed *Kearney* in refusing to reconsider the merits. *Id.*, at 208.

After serving the jail portion of his sentence, Watkins was kept in jail, purportedly under writs of *capias ad satisfaciendum* issued to collect the fines assessed against him. *Ex parte Watkins*, 7 Pet. (32 U. S.) 568, 571 (1833). He returned to the Supreme Court with two complaints: that the fine was excessive and that his continued detention was not authorized by the writs.

Justice Story, writing for the Court, dispatched the first objection in a single paragraph. Even though the habeas petition raised a specific constitutional objection going directly to the constitutionality of his sentence, the Court's lack of appellate jurisdiction over the case precluded it from revising the judgment on habeas corpus. *Id.*, at 574. Watkins was discharged, however, because his continued detention after the return date of the *capias* writ was not authorized by that writ. *Id.*, at 578-579.

There is an undercurrent in these old authorities that runs throughout the history of habeas corpus. The availability of

the writ to a person committed by a judicial officer depends on the degree of confidence which courts have in that officer and in other means of review.

Accused persons could be committed for trial by justices of the peace. 4 W. Blackstone, *Commentaries* *296. Because these officials were not necessarily learned in the law, see 1 Blackstone, at *352-353 (qualifications), it was obviously necessary to have some method of review of pretrial commitments, and such review was the usual function of habeas corpus.

Bushell's Case, *supra*, clearly distinguishes contempts from criminal cases on the basis of confidence in the jury system. Vaughan, at 142-143. Lord Ellenborough further distinguishes inferior from superior court contempt judgments. *Burdett v. Abbott*, *supra*, 14 East, at 73. Again, the difference is confidence. "It is a confidence, that may, with perfect safety and security, be reposed in the Judges [of superior courts]" *Brass Crosby's Case*, *supra*, 3 Wils., at 204 (Blackstone, J., concurring).

The early Supreme Court habeas cases reflect Congress's decision as to which determinations were subject to review. In *Bollman*, *supra*, 4 Cranch, at 99-100, the Court noted that Congress had expressly authorized the Supreme Court to make pretrial detention decisions. In *Kearney and Watkins*, on the other hand, the fact that Congress had decided to repose confidence in the circuit courts to render unappealable final judgments was decisive.

C. Post-Reconstruction Cases.

The rule of *Kearney and Watkins* was not limited to federal practice. It was the general rule throughout the United States in the mid-nineteenth century that a court could not revise indirectly through habeas corpus a judgment which it had no power to revise directly on appeal.

"A superior court, in the exercise of its revisory jurisdiction, may discharge a prisoner held under criminal

process, where the commitment is voidable only, or where the grounds of commitment are insufficient; but to justify this it must have, by its constitution, appellate jurisdiction in the given case, and should exert its corrective power through process designed to bring under review the errors complained of, or the grounds of commitment.

"1st. The court issuing the writ in such cases must be clothed with a supervisory power in the given case.

"It is not enough that it is a court of more extensive jurisdiction or of higher dignity; it must have the power of revision in the particular case; the power to correct or reverse the action of the inferior court." R. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus* 348-349 (2d ed. 1876) (emphasis added, footnote omitted).

This contemporary understanding of the law of habeas corpus must be kept in mind when considering the Habeas Corpus Act of 1867. By its terms, the Act merely extends jurisdiction to state prisoners, removing a limitation in the Judiciary Act of 1789. 14 Stat. 385, ch. 28, § 1; cf. 1 Stat. 73, 81-82, ch. 20, § 14. If Congress really intended to abrogate the rule of *Kearney and Watkins* and make habeas a substitute for appeal, it is exceedingly odd that it did not say so. *Brown v. Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring in the judgment); *Fay v. Noia*, 372 U. S. 391, 452 (1963) (Harlan, J., dissenting).³

The scope of federal habeas corpus did expand in the late nineteenth century, but not in state prisoner cases under the 1867 act. The major expansion of habeas review came in cases

3. Congress did modify the common law rule by permitting the petitioner to contest the facts stated in the return. This statutory modification follows one adopted by Parliament in 1816, 56 Geo. 3, ch. 100, § 3, and in numerous states. See Hurd, *supra*, at 273-288.

involving *federal* prisoners. The real reason for the expansion was an absence of other remedies.

The same act that gave federal courts habeas jurisdiction for state prisoners also gave the Supreme Court appellate jurisdiction over federal questions in state criminal cases. 14 Stat. 386-387, ch. 28, § 2. Yet the Supreme Court still had no general criminal appellate jurisdiction in federal cases. See *Cross v. United States*, 145 U. S. 571, 574 (1892).

The Supreme Court extended an effective appellate jurisdiction over the circuit courts in a limited class of cases through a strained interpretation of what was a "jurisdictional" defect. *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1873) held that imposition of both a fine and imprisonment, under a statute authorizing only one or the other, was jurisdictional. *Ex parte Siebold*, 100 U. S. 371, 376-377 (1879) held that the constitutionality of the statute creating the offense was jurisdictional and subject to review on habeas. *Ex parte Wilson*, 114 U. S. 417, 429 (1885) held that trial for an "infamous" crime without an indictment was a jurisdictional defect.

At the same time the Supreme Court was expanding quasi-appellate review in cases where there was *no* direct appeal, however, the Court was shutting down habeas corpus in cases where an appeal *was* available. The mechanism for this limitation was the exhaustion doctrine. Although federal courts had the power to consider federal questions on habeas corpus, they should refrain from doing so until appellate remedies were exhausted. *Ex parte Royall*, 117 U. S. 241, 250-253 (1886). The remedies to be exhausted included the writ of error to the Supreme Court, *Tinsley v. Anderson*, 171 U. S. 101, 105-106 (1898), with the result that there was generally nothing left to litigate. Full exhaustion of remedies resulted in a ruling on the federal questions from the highest court.

Once again, we see confidence in the primary remedy as the driving force behind the denial of relitigation on habeas. In *In re Wood*, 140 U. S. 278 (1891), the issue was whether there had been racial discrimination in the selection of juries. That question

"was a question which the trial court was entirely competent to decide, and its determination could not be reviewed by the Circuit Court of the United States upon a writ of *habeas corpus* without making that writ serve the purposes of a writ of error. *No such authority is given to the Circuit Courts of the United States by the statutes defining and regulating their jurisdiction.* It often occurs in the progress of a criminal trial in a state court, proceeding under a statute not repugnant to the Constitution of the United States, that questions occur which involve the construction of that instrument and the determination of rights asserted under it. But that does not justify an interference with its proceedings by a Circuit Court of the United States, upon a writ of *habeas corpus* sued out by the accused either during *or after the trial* in the state court. For 'upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them;' and 'if they fail therein, and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination.' *Robb v. Connolly*, 111 U. S. 624, 637." *Id.*, at 286 (emphasis added).

Contrary to popular myth, *de novo* review of convictions on habeas corpus is *not* a legacy of the common law, is *not* mandated by the Suspension Clause, and was *not* commanded by Congress in 1867. It is a judicial creation of the twentieth century, and whether it should continue depends on the continuing existence of the circumstances which brought it about. To that development we now turn.

II. Mandatory *de novo* review is not the true holding of *Brown v. Allen* and has not been codified since then.

A. Pre-Brown Cases.

In the early twentieth century, the availability of primary remedies was altered. The change came partly by growth of the country and partly by statutory revision. The writ of error was supposed to issue in all cases within the Supreme Court's jurisdiction, unless the decision below "was so plainly right as to not require argument. . . ." *Spies v. Illinois*, 123 U. S. 131, 164 (1887). Yet in later cases, the writ was denied even though clearly arguable questions were present. Compare *Ex parte Frank*, 235 U. S. 694 (1914) with *Frank v. Mangum*, 237 U. S. 309 (1915). In 1915, Congress made it official. It relegated federal questions other than the validity of statutes to the Court's discretionary certiorari jurisdiction. 39 Stat. 727, ch. 448, § 2.

Earlier that same year, the Supreme Court decided *Frank v. Mangum*, *supra*. Although *Frank* is widely regarded as having narrowed habeas corpus, the decision in fact widened it. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 486-487 (1963). The question of whether the jury was really subject to the influence of a hostile crowd was not "jurisdictional" even within the broad definition of *Lange*, *Siebold*, and *Wilson*.

The *Frank* Court implicitly accepts the proposition that if Frank's allegations were true habeas relief would be proper, a departure from the rule of *In re Wood*, 140 U. S. 278, 286 (1891). The *Frank* decision rests instead on the state court's determination of the historical facts against Frank, which "must be taken as setting forth the truth of the matter, certainly until some reasonable ground is shown for an inference that the court . . . was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction. . . ." 237 U. S., at 336.

This is a rule of partial but not complete deference by the habeas court. *Frank* expressly left open the possibility that the determination might be reopened on a sufficient showing. *Id.*,

at 334. *Frank* deals with historical fact determinations because that is the kind of determination involved in the case. As to such determinations, the rule of partial deference has since been codified, with embellishments, by Congress. See 28 U. S. C. § 2254(d). It was also accepted by the opinion which launched the rule of *de novo* redetermination of "mixed questions." *Brown v. Allen*, 344 U. S. 443, 506 (1953) (opinion of Frankfurter, J.). Yet nothing in the logic of *Frank* or the other cases leading up to *Brown* justifies a distinction between fact and law.

Moore v. Dempsey, 261 U. S. 86, 91 (1923) accepted *Frank* as a precedent but found that an investigation into the facts was required in that case. The reason for distinguishing *Frank* is not entirely clear from Justice Holmes' brief opinion. It may have been the magnitude of the mob domination alleged, see Brief Amicus Curiae of Criminal Justice Legal Foundation in *Keeney v. Tamayo-Reyes*, No. 91-1859, at 9, or it may have been the absence of any careful, reasoned state decision, see Bator, *supra*, 76 Harv. L. Rev., at 488-489.

While *Frank* and *Moore* struggled with prior adjudication in state court, a second line of cases developed dealing with prior adjudications in an earlier federal habeas petition. This other road led to the same destination: a rule of deference but not absolute preclusion.

The series begins with *Ex parte Cuddy*, 40 F. 62 (C.C.S.D. Cal. 1889), an opinion by Justice Field as circuit justice regarding a second application for habeas corpus after denial of the first. Justice Field held that, because appeal had been made available in habeas cases, a prior, full consideration may be sufficient by itself to justify denial of the second petition. *Id.*, at 65-66.

Shortly after the Supreme Court decided *Moore*, it fully and unanimously adopted *Cuddy* in *Salinger v. Loisel*, 265 U. S. 224 (1924). Acknowledging that *res judicata* was not fully applicable, *Salinger* held that a prior adjudication nonetheless had weight. *Id.*, at 230. Appellate review of both habeas denials and criminal convictions reduced the need for relitigation on

habeas corpus. *Id.*, at 231.

Salinger then construed the statutory language "to dispose of the party as law and justice may require." *Ibid.*

"A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a *right in ordinary course to an appellate review in the criminal case*, and (b) a prior refusal to discharge on a like application." *Ibid.* (emphasis added).

The cases cited for this conclusion are a mixture of state-prisoner and federal-prisoner cases, *ibid.*, indicating no distinction between prior adjudications in state or federal courts. The *Salinger* Court states that a refusal to discharge based solely on a prior refusal by a court of coordinate jurisdiction would be affirmed. *Id.*, at 232.

Wong Doo v. United States, 265 U. S. 239, 241 (1924) held that under the circumstances of that case "controlling weight *must* have been given to the prior refusal." (Emphasis added). The rule of *Salinger* was therefore not always discretionary.

In *Ex parte Hawk*, 321 U. S. 114 (1944), the Court attempted to clear up the confusion surrounding habeas corpus. *Hawk* was decided on the question of exhaustion, see *id.*, at 118, but exhaustion and deference to the prior decision after exhaustion are closely related questions. *Frank v. Mangum*, *supra*, 237 U. S., at 336. Whether dictum or holding, the language of *Hawk* on deference to prior adjudication is enlightening.

"Where the state courts have considered and adjudicated the merits of his contentions, and this Court has

either reviewed or declined to review the state court's decision, a federal court *will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated*. *Salinger v. Loisel*, 265 U. S. 224, 230-232. But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, see *Mooney v. Holohan*, *supra*, [294 U. S.] 115, or because in the particular case the remedy afforded by state law proves *in practice unavailable or seriously inadequate*, cf. *Moore v. Dempsey*, 261 U. S. 86, *Ex parte Davis*, 318 U. S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless." 321 U. S., at 118 (emphasis added).⁴

The phrase "in practice unavailable or seriously inadequate" implies something more serious than disagreement with the state court's reasonable conclusion. *Hawk* seems to reconcile *Frank* and *Moore* on their facts on the basis later suggested by Professor Bator: that the state court in *Frank* had made a careful, reasoned determination, but the state court in *Moore* had not.

Hawk's citation of *Salinger* is particularly significant, because it reinforces the connection between the successive federal petition line of cases and the prior state adjudication decisions. The prior state proceeding, in other words, is entitled to the same degree of respect as a prior federal court proceeding. Federal habeas corpus review, whether on the first or second petition, should be made available when other remedies are unavailable or inadequate. It should not be used to relitigate points already fairly decided by a competent court. Reconsideration is the exception. Refusal to reconsider is the rule.

4. *Mooney* and *Davis* are both exhaustion cases where the state court remedy had not been shown to be inadequate or unavailable at the time of application for the writ.

The question of prior state adjudication was squarely presented in *House v. Mayo*, 324 U. S. 42 (1945), where the district court had denied a petition on the ground that the claim had been fully and competently litigated in the state courts. *Id.*, at 47. *House* expressly acknowledges that the district court's deference would have been correct if the state court had ruled on the merits, citing *Hawk*, but reversed solely because the state court decision had been on the ground that the remedy sought was not available under state law. *Id.*, at 48.

When Henry Hawk returned to the Supreme Court, on certiorari from denial of state collateral relief, the Court explained the allocation of responsibilities between the state courts, the federal habeas courts, and the Supreme Court:

"When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right. *White v. Ragen*, 324 U. S. 760. When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings." *Hawk v. Olson*, 326 U. S. 271, 276 (1945).

B. *Brown v. Allen*.

With this foundation, we come to the landmark case of *Brown v. Allen*, 344 U. S. 443 (1953). Justice Reed's opinion is the opinion of the Court on all points except the effect of the prior denial of certiorari. *Id.*, at 451-452. Although Justice Frankfurter sought to designate part II of the first of his two opinions as a second majority opinion, *id.*, at 497, it is not designated as such by the Court. Indeed, it is not fully joined by any other Justice, although others express a very general agreement. See *id.*, at 488 (Burton and Clark, JJ.) ("recognize the propriety of the considerations . . ."); *id.*, at 513 (Black and Douglas, JJ.) ("agree in substance").

The opinion of the Court holds that the state court opinion should not be disregarded as to either fact or law. After deal-

ing with independent state grounds and factual determinations, the Court states, "In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata*." *Id.*, at 458.

By itself, this statement is opaque. It is made clear, however, by the Court's later statement that the rule of *Salinger* applies to state prisoners. *Id.*, at 463. Nothing in *Salinger* is limited to factual determinations, and indeed the issues in that case were legal rather than factual.

Because the *Salinger* rule is one of discretion and not *res judicata*, the majority proceeds to look at the merits for the purpose of reviewing the district court's "conclusions that North Carolina accorded petitioners a *fair adjudication* of their federal questions." *Id.*, at 465 (emphasis added). The question presented, according to the majority, is "Have petitioners *received hearings* consonant with standards accepted by this Nation as adequate to justify their convictions?" *Ibid.* (emphasis added).

Where the historical facts are settled and the question is application of the law to the facts, there is more than one way to determine that the state courts have provided a "fair adjudication." One way is to look at the merits and decide that the state court's conclusion is correct. That is what the *Brown* majority proceeded to do in two of the three cases. *Id.*, at 466-482.⁵

While agreement with the result is *sufficient* for concluding that the state has provided a "fair adjudication," it does not follow that agreement is *necessary* to such a conclusion. It does not follow that a state court decision with which the federal court disagrees is necessarily unfair.

5. The third case, *Daniels*, was decided on a procedural bar. *Id.*, at 487.

Justice Frankfurter takes the majority to task for its "[v]ague, undefined directions permitting the District Court to give 'consideration' to a prior State determination." *Id.*, at 501. The alternative he proposes, however, is an audacious revision of the law of habeas corpus, unsupported by any authority.

"State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide." *Id.*, at 506. The only authority given for this remarkable statement is part Fifth of the same opinion, at 507-508. *Id.*, n. 19. But that part does not cite *one single case* involving federal habeas for state prisoners.

Regarding the anomaly of a federal district court judge setting aside the decision of a state supreme court, Justice Frankfurter says "it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law." *Id.*, at 510.

This statement is a *non sequitur*. A state court which disagrees with a federal court is not defying the Supremacy Clause or asserting state law over federal. It is merely disagreeing on the unresolved question of what the federal law is. See *New York v. Eno*, 155 U. S. 89, 98 (1894). While Congress certainly does have the *power* to designate the district courts to "express the higher law" over the reasonable, contrary opinion of the state supreme courts, see 344 U. S., at 510, it is by no means a "fact" that Congress has actually done so, cf. *ibid.*

The real reason for Justice Frankfurter's position comes at the end. It is a lack of confidence in the primary remedy. "Unfortunately, instances are not wanting in which even the highest State courts have failed to recognize violations of these precepts that offend the limitations which the Constitution of the United States places upon enforcement by the States of their criminal law." *Id.*, at 511; see also *Irvin v. Dowd*, 366 U. S. 717, 729-730 (1961) (Frankfurter, J., concurring).

C. Post-Brown Developments.

By the early 1960's, the discretionary rule of *Salinger, Hawk, House*, and the *Brown* majority was forgotten, and Justice Frankfurter's opinion was cited as if it were the holding of the Court. See, e.g., *Fay v. Noia*, 372 U. S. 391, 422 (1963), overruled on other grounds in *Coleman v. Thompson*, 115 L. Ed. 2d 640, 669, 111 S. Ct. 2546, 2565 (1991). Thus the rule of mandatory *de novo* review of questions of law and "mixed questions" slithered sideways into the law. No opinion of this Court has ever squarely confronted the conflict between the supposed "rule" of *Brown v. Allen* and the contrary interpretation of the statutes in prior cases.

In the past 16 years, some substantial exceptions to the norm of *de novo* review have been created or revived. The jurisdictional rule of procedural default was effectively abolished in *Fay v. Noia*, *supra*, but revived in a less severe, nonjurisdictional form in *Wainwright v. Sykes*, 433 U. S. 72, 87-88 (1977). Application of new rules of law on habeas was banned, except for two extremely rare exceptions, in *Teague v. Lane*, 489 U. S. 288 (1989). The *Teague* principle "validates reasonable, good-faith interpretations of existing precedents made by state courts . . ." *Butler v. McKellar*, 494 U. S. 407, 414 (1990).

De novo review has also been curtailed somewhat by a slightly expanded view of what constitutes a question of fact. After years of dubious distinctions between cases not really distinguishable,⁶ *Miller v. Fenton*, 474 U. S. 104, 114 (1985) acknowledged that the distinction was often driven by the result. That is, a question was classified as "factual" or "mixed" according to where the Court believed the primary responsibility for decision should be allocated "as a matter of the sound administration of justice." *Ibid.*

6. See Brief Amicus Curiae of Criminal Justice Legal Foundation in Support of the Petition for Certiorari, at 5.

The most important existing exception to *de novo* review of law application is *Stone v. Powell*, 428 U. S. 465 (1976). *Powell* held that it was an open question "whether exceptions to full review might exist with respect to particular categories of constitutional claims," *id.*, at 478-479, and then proceeded to create one for Fourth Amendment claims, *id.*, at 481-482.

Powell is based in large part on considerations unique to the exclusionary rule. See *id.*, at 482-489. Yet the recurring theme of habeas history, confidence in the primary remedy, is also clearly present. The argument against the *Powell* rule "stem[s] from a basic mistrust of the state courts." *Id.*, at 493, n. 35. *Powell* acknowledged "the unsympathetic attitude to federal constitutional claims . . . in years past" but was "unwilling to assume that there now [in 1976] exists a general lack of appropriate sensitivity to constitutional rights" in state courts. *Ibid.* (emphasis added).

The dissent obviously does not share this confidence. See *id.*, at 525 (Brennan, J.). The dissent assumes throughout that any disagreement between state and federal courts constitutes "disrespect and disregard for the Constitution" by the state court. See *id.*, at 524. The possibility that the state court might be right and the federal court wrong does not seem to occur to the dissent.

D. Congressional Silence.

If exceptions to *de novo* review can be judicially created, it necessarily follows that there is no Congressional mandate for *de novo* review. If Congress had created such a rule, only Congress could create exceptions. Indeed, Justice Brennan's dissent in *Powell* is based primarily on his assumption, uncritically adopted from Justice Frankfurter, that Congress had mandated such a rule. See *Stone v. Powell*, 428 U. S. 465, 526-528 (1976). Yet the fact is that since 1867 Congress has never spoken a word directly on the subject of prior state determinations of law, although it has spoken on a number of related issues.

In 1891, this Court declared that procedural constitutional questions, as opposed to the constitutionality of the underlying statutes, were within the competence of the state courts to decide and could not be reexamined at all on habeas corpus. See *In re Wood*, quoted *ante*, at 9. Congress did nothing to change that rule.

In 1941, while discussing the exhaustion doctrine, this Court stated that the exhaustion of state remedies would normally settle the matter, and "a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated." *Ex parte Hawk*, 321 U. S. 114, 118 (1944). Seven years later, Congress codified the exhaustion rule, with a revision note expressly citing *Hawk* as a correct statement of the law. Revision note to 28 U. S. C. § 2254, 415 (1988 ed.). In the same revision, Congress made a reference to previous federal adjudication, but nothing indicated an intent to limit the preexisting discretion to deny habeas on the basis of prior state adjudications. *Brown v. Allen*, 344 U. S. 443, 462 (1953).

In 1966, Congress spoke on the subject of prior state adjudications of fact, the least controversial form of deference. The *Powell* dissent claimed that this represented a ratification of the rule of *de novo* review of questions of law. 428 U. S., at 528. The *Powell* decision is necessarily a rejection of that argument.

In the same year *Powell* was decided, Congress considered whether to overrule it when it amended the habeas corpus rules. Congress decided not to decide. H.R. Rep. No. 1471, 94th Cong., 2d Sess., reprinted in 1976 U. S. Code Cong. & Admin. News 2478, 2479.

After *Teague v. Lane*, *supra*, carved out a second major exception to *de novo* review, Congress again considered whether to specify its own rule of retroactivity. The House and Senate could not agree, and habeas reform was stripped out of the crime bill by the conference committee. *Statement of President George Bush Upon Signing S. 3266*, 1990 U. S. Code Cong. & Admin. News, 101st Cong., 2d Sess., 6696-1.

The story was much the same in 1991. A bill supported by the President was introduced which would have abolished *de novo* review on habeas corpus. 137 Cong. Rec. S3192, S3199. The habeas provisions of this bill were incorporated into a bill which overwhelmingly passed the Senate. 137 Cong. Rec. S9982, S9999. An amendment to put those provisions into the House bill failed by a narrow margin. 137 Cong. Rec. H7996, 8005. Congress adjourned without reconciling the two bills. W. Rehnquist, *1991 Year-End Report on the Federal Judiciary* 4.

In *Helvering v. Hallock*, 309 U. S. 106 (1940), this Court was also faced with a situation where the same statutory language had been construed inconsistently in successive Supreme Court opinions. As in this case, Congress had never said which interpretation was correct, although it had acted in the area. *Id.*, at 120, n. 7. In such circumstances, *stare decisis* is "not a mechanical formula of adherence to the latest decision. . . ." *Id.*, at 119. Where the earlier interpretation is better reasoned, the Court should return to it. *Id.*, at 119-120.

The Framers deliberately made legislation difficult because they considered the legislature to be the most dangerous branch. See *The Federalist No. 48*, at 309 (Madison) (Rossiter ed. 1961). Legislation normally requires the agreement of three organs of government: the Senate, the House, and the President. U. S. Const. art. I, § 7, cl. 2. An erroneous interpretation of a statute by this Court should not be made permanent and unchangeable by Congressional failure to act. If such a rule is followed, then each one of these three organs has effectively acquired the power to legislate that interpretation by itself, merely by blocking the efforts of the other two to correct it. To prevent this distortion of the legislative function, this Court must retain the ability to correct its own misinterpretation of statutes, especially where Congress is deadlocked.

III. Changes in the law and the nation since *Brown v. Allen* call for reconsideration.

A. The Scope of "Constitutional" Claims.

At the time *Brown v. Allen*, 344 U. S. 443 was decided in 1953, there were few federal constitutional restrictions on state criminal procedure. The *ex post facto* and bill of attainder restrictions of the original Constitution rarely arose. The Due Process Clause of the Fourteenth Amendment incorporated only those specific guarantees which were deemed "of the very essence of a scheme of ordered liberty." *Palko v. Connecticut*, 302 U. S. 319, 325 (1937), overruled in *Benton v. Maryland*, 395 U. S. 784, 796 (1969). Habeas petitions attacking procedural matters were thus generally limited to claims of racial discrimination, e.g., *Brown, supra*, 344 U. S., at 465-474 (jury selection), and claims of violations so egregious as to render the entire proceeding a sham, see *Frank v. Mangum*, 237 U. S. 309 (1915) (mob domination); *Moore v. Dempsey*, 261 U. S. 86 (1923) (same); *Brown, supra*, 344 U. S., at 474-475 (allegedly coerced confession).

The scope of "constitutional" claims today is vastly broader. A defendant with a constitutional claim is not necessarily contending that he has been denied fundamental fairness. More often than not, he is simply contending that the trial court failed to comply with a detailed code of criminal procedure promulgated through the decisions of this Court. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 155-156 (1970). Many of these rules are far from fundamental. *Id.*, at 156-157. The exclusionary rule of *Mapp v. Ohio*, 367 U. S. 643 (1961), is an extreme case, serving a purely external purpose and actually detracting from the fairness and accuracy of the trial. See *Stone v. Powell*, 428 U. S. 465, 490 (1976).

As a result of the proliferation of prophylactic rules, the gray zones where reasonable judges differ are usually far removed from the core of the constitutional right. *Duckworth v. Eagan*, 492 U. S. 195 (1989) and *Butler v. McKellar*, 494 U. S. 407 (1990) were disputes over whether the *Miranda* rule

had been observed, not over whether the suspects had genuinely been coerced into confessing. *Francis v. Franklin*, 471 U. S. 307 (1985) involved a borderline transgression of the rule of *Sandstrom v. Montana*, 442 U. S. 510 (1979), which is extrapolated from *In re Winship*, 397 U. S. 358 (1970), which discovered that a rule of evidence previously thought to be subject to legislative control, see *Morrison v. California*, 291 U. S. 82, 88 (1934), was instead a part of the Due Process Clause. This is not to say that these rules are wrong or undesirable. It is only to say that "constitutional" rules today are often a long way from fundamental and far removed from the text of the Constitution. See *Rose v. Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting).

B. The Availability of Counsel.

A second and fundamental difference between state courts today and those of four decades ago is the availability of counsel. A felony defendant today has the benefit of counsel both at trial, *Gideon v. Wainwright*, 372 U. S. 335 (1963), and on the first appeal, *Douglas v. California*, 372 U. S. 353 (1963). Before a defendant ever reaches federal habeas corpus, he has had his case argued by counsel not once but at least twice. The reliability of the state courts in ruling on the federal questions is thus substantially enhanced.

C. Acceptance of Federal Authority.

The rule of *de novo* relitigation was part of the long struggle to establish the supremacy of federal law. From the Nullification Acts, to the Civil War, to the Little Rock school incident, to George Wallace's infamous stand in the schoolhouse door, federal authority had been bitterly resisted. Unquestionably, at the time of *Brown v. Allen* there were many state courts that could not be trusted. Does the same hold true today?

More progress has been made toward acceptance of federal authority in the last thirty years than in the previous hundred. Is it conceivable that in 1992 a judge of a state court of general jurisdiction would answer a federal constitutional objection by

saying "that the 'case [was] not being tried under the Federal Constitution' "? See *Estes v. Texas*, 381 U. S. 532, 556 (1965) (Warren, C. J., concurring). Would the governor of a state today call out the militia to block a federal desegregation order, forcing the President to call in the Army? See *Cooper v. Aaron*, 358 U. S. 1, 9-12 (1958). Would a governor personally stand in the way of the enforcement of a federal court order? See L. Sobel, *Civil Rights 1960-1966*, at 217-218 (1967).

These occurrences of 30 and 35 years ago are inconceivable today. The supremacy of federal law is universally acknowledged and is routinely applied in the state courts. See *Stone v. Powell*, *supra*, 428 U. S., at 493, n. 35; *Sawyer v. Smith*, 111 L. Ed. 2d 193, 210-211, 110 S. Ct. 2822, 2831 (1990). The differences today are differences of interpretation, not obstinate resistance.

The 16-year experiment of *Powell* produces some useful data on the trustworthiness of state courts in the absence of *de novo* review on federal habeas. If the dire warnings of those who insist on the necessity of *de novo* review were correct, see, e.g., *Butler v. McKellar*, 494 U. S. 407, 430-431, n. 12, (1990) (Brennan, J., dissenting), then we could confidently expect that disaster would have occurred in the decade and a half since *Powell*. Blatant violations of the Fourth Amendment should be routinely going uncorrected in state courts, swamping this Court with clearly meritorious certiorari petitions and requiring many summary reversals.

The reality, judging from this Court's Fourth Amendment cases arising from state courts, is quite different. State courts are reversed as often for wrongly suppressing evidence as for wrongly admitting it. Looking at the October 1989 and 1990 terms, it appears that state courts were reversed for erring in the defendant's favor considerably *more* often than for erring against him. See *The U. S. Supreme Court 1989-90 Term*, 47 B.N.A. Cr.L. 3105-3117 (1990); *The U. S. Supreme Court 1990-91 Term*, 49 B.N.A. Cr.L. 3101-3104 (1991). To be sure, there are many other factors besides the correctness of the decision below in determining whether this Court takes the case. Even so, if the dismal assessment of state courts which the propo-

nents of *de novo* habeas review assert were correct, the reversal rates would surely be lopsided in the other direction.

D. Supposed Superiority of Federal Courts.

In the 1960's, when the specific guarantees of the Bill of Rights were being "incorporated" at a rapid clip, it was reasonable to believe that federal judges were more familiar with the Bill of Rights than state judges who had not previously needed to apply it. Not so today. Federal rights pervade state criminal procedure today, and state judges spend a somewhat larger proportion of their time on criminal cases. Compare 2 Judicial Council of California, *1988 Annual Report* 43 (47% criminal caseload in courts of appeal in 1986-87) with *1988 Annual Report of the Ninth Circuit* 56 (33% criminal and prisoner petitions in 1987). The bulk of lawyers and judges today have spent all or most of their careers in the post-incorporation environment.

As noted earlier, *ante*, at 18, the assumption that the federal habeas court is always right permeates the view of those who would preserve the *status quo*. Regrettably, this is far from true. Time and again, in recent years, this Court has been called upon to correct erroneous judgments and precedents of the federal courts on issues where the state courts were right from the beginning. See, e.g., *Pulley v. Harris*, 465 U. S. 37 (1984); *Wainwright v. Goode*, 464 U. S. 78 (1983); *Kuhlmann v. Wilson*, 477 U. S. 436, 459-461 (1986); *Lewis v. Jeffers*, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990); *Estelle v. McGuire*, 60 U. S. L. W. 4015 (1991). Compare *Walton v. Arizona*, 111 L. Ed. 2d 511, 524-525, 110 S. Ct. 3047, 3053-3054 (1991) with *Adamson v. Ricketts*, 865 F. 2d 1011, 1023-1029 (CA9 1988). For the reasons stated in the Attorney General's brief, the present case is also an example. "Misapplication of this Court's opinions is not confined to the state courts. . . ." *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U. S. 511, 519 (1955).

IV. The rule of *Salinger/Hawk* should be restored, with additional guidance, denying reconsideration for most "mixed questions."

"Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." *McCleskey v. Zant*, 113 L. Ed. 2d 517, 543, 111 S. Ct. 1454, 1469 (1991). That burden must surely be borne in a case such as *Moore v. Dempsey*, 261 U. S. 86 (1923), in the extremely unlikely event that such a travesty could occur today and go uncorrected by the state courts. On the other hand, these scarce resources and those of the state are squandered relitigating cases such as *Blair v. McCarthy*, 881 F. 2d 602 (CA9 1989), dismissed as moot and remanded, 112 L. Ed. 2d 391, 111 S. Ct. 377 (1990), disapproved in *Estelle v. McGuire*, 60 U. S. L. W. 4015, 4017, n. 2 (1991). The essential question is how to apportion the resources according to the magnitude of the alleged error.

From the very early days of federal habeas for state prisoners, this Court has recognized that the lower federal courts have the power to interfere with state criminal proceedings, but that this power must be exercised sparingly. *Ex parte Royall*, 117 U. S. 241, 252-253 (1886). The exhaustion doctrine of *Royall* is the best example of such a limitation. Although originally a guideline for the court's discretion, it has become a set of rules developed through long experience, with only a limited area left for individual judgment. See *Rose v. Lundy*, 455 U. S. 509, 522 (1982) (mandatory dismissal of mixed petition). This is a salutary development, for the outcome of a legal proceeding ought not to depend on which judge is selected at random from those on the roster of the court.

The doctrine of procedural default has similarly evolved as a nonjurisdictional limitation on the exercise of the power of habeas corpus. See *Coleman v. Thompson*, 115 L. Ed. 2d 640, 655-657, 111 S. Ct. 2546, 2553-2555 (1991); *Murray v. Carrier*, 477 U. S. 478, 497 (1986) ("sound and workable means of channeling the discretion"). The rule against consideration of successive petitions is another example. See generally *McCleskey*, *supra*.

With regard to prior adjudications on the merits in state court, questions of fact are now governed largely by statute, 28 U. S. C. § 2254(d), while questions of pure law are governed largely by the "new rule" principle and its exceptions. As to the application of the law to the specific facts of the case, however, amicus submits that the time has come to restore the basic rule as stated in *Ex parte Hawk*, 321 U. S. 114 (1944): "a federal court will not *ordinarily* re-examine upon writ of habeas corpus the questions thus adjudicated." *Id.*, at 118 (emphasis added). The interpretation of the words "to dispose of the party as law and justice may require" as set forth in *Salinger v. Loisel*, *ante*, at 12, should be restored. That interpretation has not been overruled by this Court or by Congress, and no good reason exists for not following it.

Although amicus believes the *Salinger/Hawk* rule to be basically correct, Justice Frankfurter had an undeniably valid point when he said that the *Brown* majority and *Hawk* did not provide sufficient guidance for determining whether the case was an ordinary or extraordinary one. *Brown v. Allen*, 344 U. S. 443, 501 (1953) (opinion of Frankfurter, J.); see *McCleskey*, *supra*, 113 L. Ed. 2d, at 546, 111 S. Ct., at 1471. Instead of the guidelines Justice Frankfurter set down nearly four decades ago, however, amicus submits that this Court should establish new guidelines taking into account the changes in the nation and the law which have occurred in the interim.

"[C]laims of constitutional error are not fungible." *Rose v. Lundy*, 455 U. S. 509, 543 (1982) (Stevens, J., dissenting). Despite the protests raised against this thesis, *Stone v. Powell*, 428 U. S. 465, 529 (1976) (Brennan, J., dissenting), its truth is, by this time, undeniable. It is demonstrated by the differences in retroactivity, both under the old regime, *Lundy*, 455 U. S., at 543, n. 8 (Stevens, J., dissenting), and under the new one, see *Penry v. Lynaugh*, 492 U. S. 302, 330 (1989) (exception to *Teague* for categorical exemption from punishment).

Constitutional claims are also classified for the purpose of harmless error analysis. In *Arizona v. Fulminante*, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991), there was no dispute that some claims are subject to harmless error analysis and

some are not. The only dispute was the classification of the claim in question. Compare *id.*, 113 L. Ed. 2d, at 331, 111 S. Ct., at 1265, (Rehnquist, C.J., for the Court on this point) with *id.*, 113 L. Ed. 2d, at 321, 111 S. Ct., at 1256, (White, J., dissenting on this point).

For the application of law to specific facts, amicus submits that the Court should accept the frank admission in *Miller v. Fenton*, 474 U. S. 104, 114 (1985), that the question of whether federal habeas courts should defer to the state adjudication is a "matter of the sound administration of justice" to be established issue by issue. Useful guideposts for this determination can be found in several aspects of this Court's decisions. How early in our history was the rule recognized as constitutional as applied to the states? Was the rule fully retroactive? What kind of harmless error analysis has been applied to violations of the rule?

A few examples will help illustrate these considerations. The right to counsel was recognized in complex cases long before the incorporation doctrine. *Powell v. Alabama*, 287 U. S. 45 (1932). The extension of that right to all felonies was fully retroactive, see *Pickelsimer v. Wainwright*, 375 U. S. 2 (1963), and a violation is reversible *per se*. *Fulminante*, *supra*, 113 L. Ed. 2d, at 331, 111 S. Ct., at 1265. Thus, if a state denies counsel to a felony defendant who never, at any time in the proceedings, makes a valid waiver, or if the state appoints counsel under external conditions making effective assistance impossible, see *Powell*, *supra*, 287 U. S., at 71, the federal court should apply the law to these facts *de novo*. On the other hand, federal scrutiny of counsel's actual performance following a valid appointment is a relatively recent development, and such a claim requires an affirmative showing of prejudice. *Strickland v. Washington*, 466 U. S. 668, 687 (1984). These determinations are appropriate for a degree of deference to the prior adjudication, discussed further below.

Coerced confessions were also recognized very early as constitutional violations. *Brown v. Mississippi*, 297 U. S. 278 (1936). Although they have recently been held to be subject to harmless error analysis by a narrow majority in *Fulminante*,

supra, the "half century of unwavering precedent" described by *Miller, supra*, 474 U. S., at 115, justifies *de novo* review of such claims.

Antiquity and rejection of harmless error similarly justify *de novo* review of claims of systematic exclusion of minorities from jury service. See *Vasquez v. Hillery*, 474 U. S. 254, 260-261 (1986). The same is not true of *Batson* claims. They involve a rule of much newer vintage, and their adjudication depends heavily on the trial judge's evaluation. See *Batson v. Kentucky*, 476 U. S. 79, 97 (1986). Although undeniably important, the *Batson* rule was not so fundamental as to require retroactive application on habeas corpus. *Allen v. Hardy*, 478 U. S. 255 (1986).

Under these standards, the vast majority of law application claims will be subject to deference to the prior state adjudication. The question, then, is what degree of deference is appropriate? A couple of points need to be considered here.

First, the habeas court should consider the nature of the state proceeding, for not all proceedings are entitled to equal deference. See *Ex parte Cuddy*, 40 F. 62, 66 (C.C.S.D. Cal. 1889). The federal statute and rules contemplate that "it is the duty of the court to screen out frivolous applications" without a hearing. Advisory Committee Note to Rule 4 of Rules Governing Section 2254 Cases in the United States District Courts. The state courts should be permitted a similar screening process in state habeas proceedings, and the outcome of that process should be respected. If the federal petition presents the same claims summarily dismissed by the state court, that dismissal is entitled to deference under the standard described below. If the federal petition presents new grounds, they should be dealt with under the doctrines of exhaustion and procedural default.

If the allegations in a state habeas petition were sufficiently substantial to warrant a hearing in state court, the federal court should consider whether counsel was available.⁷ The state has no obligation to provide counsel on state habeas, *Pennsylvania v. Finley*, 481 U. S. 551, 555 (1987), but if it requires a prisoner to go into a habeas hearing unaided, it cannot expect deference to the result of a lopsided contest. A defendant who spurns the state's offer of counsel, on the other hand, should not be permitted to exploit his own folly.⁸

The second question is whether the state court actually reached the merits. See *House v. Mayo*, 324 U. S. 42, 47-48 (1945). If not, the case is properly considered under the rules of exhaustion and procedural bar. Considerations similar to those in *Ylst v. Nunnemaker*, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991) and *Coleman v. Thompson*, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) may be necessary to decide this question. Significantly, the rule *amicus* proposes will produce an affirmative incentive for state courts to reach the merits, in contrast to the opposite incentive of the procedural default rule.

If (1) the issue is one subject to deference, (2) defendant had or waived counsel on direct appeal and on any state collateral review requiring a hearing, and (3) the state court actually reached the merits, then *amicus* submits that the federal court should decline to reconsider the question, unless the state decision is so clearly wrong that reasonable, competent judges cannot differ. The state courts have an equal responsibility to resolve federal questions and are equally competent to do so. The fact that one set of judges disagrees with another

7. An argument can be made that counsel should always be provided on the first habeas petition of a capital defendant. Cf. 21 U. S. C. § 848(q)(4)(b). As this is not a capital case, this point need not be addressed.

8. The state is required to provide counsel to indigents on appeal. *Douglas v. California*, 372 U. S. 353 (1963). Absent an independent violation of that right, the issues presented on appeal will necessarily have been briefed by counsel unless defendant waived counsel.

on a nonfundamental question is not a good enough reason to interfere with a final judgment of a court of competent jurisdiction.

Applied to the present case, the issue is straightforward. Not only was West found in possession of a variety of unusual, recently stolen items, but, in addition, he gave an explanation which the jury must have concluded was a lie. Even though exculpatory on its face, there is certainly nothing wrong with the jury considering a false explanation as inculpatory. *Wilson v. United States*, 162 U. S. 613, 620-621 (1896). Reasonable judges could certainly conclude that this verdict is sustainable under *Jackson v. Virginia*, 443 U. S. 307 (1979). The *Jackson* rule is a nonfundamental rule, not traditionally considered constitutional. See *Sunal v. Large*, 332 U. S. 174, 179 (1947). The state court decision, rendered in a considered judgment after presentation of defendant's case by counsel, is entitled to deference.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be reversed.

Dated: January, 1992

Respectfully submitted,

KENT S. SCHEIDEGGER

*Attorney for Amicus Curiae
Criminal Justice Legal Foundation*

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ELLIS B. WRIGHT, JR., WARDEN, et al.,

Petitioner,

—v.—

FRANK ROBERT WEST, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AMICI
CURIAE AND BRIEF AMICI CURIAE ON BEHALF
OF GERALD GUNTHER, PHILIP B. KURLAND,
DANIEL J. MELTZER, PAUL J. MISHKIN, MARTIN
H. REDISH, FRANK J. REMINGTON, DAVID L.
SHAPIRO, AND HERBERT WECHSLER,
SUPPORTING AFFIRMANCE**

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No. 91-542

In the
Supreme Court of the United States
October Term 1991

Ellis B. Wright, Jr., Warden, et al.,
Petitioner,
vs.

Frank Robert West, Jr.,
Respondent.

On Petition for a Writ of Certiorari
to the
United States Court of Appeals
for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE ON BEHALF OF GERALD GUNTHER,
ET AL.

Gerald Gunther, Philip B. Kurland,
Daniel J. Meltzer, Paul J. Mishkin,
Martin H. Redish, Frank J. Remington,
David L. Shapiro, and Herbert Wechsler
move the Court, pursuant to Rule 37.4,
for leave to file the attached brief as
amici curiae in support of affirmance.

1. The respondent, Frank Robert West, has consented to this filing by letter lodged with the clerk. The petitioner, Ellis B. Wright, Jr., has declined to consent.

2. Amici are professors of law specializing in the jurisdiction of the federal courts and the administration of justice in the United States.

3. On December 18, 1991, the Court amended its previous order granting the warden's petition for certiorari in order to request briefs on a question, articulated by the Court itself: whether a federal habeas court should independently apply legal principles to the facts of specific cases.

4. This general question of federal law has important implications for the federal system well apart from the parties' interests in this particular

case. First, the question bears on the maintenance of the habeas jurisdiction as a mechanism for testing the legality of custody under federal law. Second, it carries significant implications for Congress' role in the prescription of federal court jurisdiction pursuant to Article III of the United States Constitution.

5. The attached brief amici curiae is addressed only to this second set of implications, which sounds in the separation of powers.

6. We understand from Mr. Wright that he has consented to amicus briefs by the American Civil Liberties Union and the American Bar Association and that he believes that those briefs will advance the argument that our brief makes.

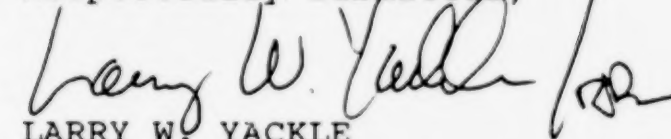
7. We respectfully submit that our brief will bring a different, academic

perspective to the extremely important, general question of federal law before the Court.

8. Over many years, we have debated one another regarding a wide variety of issues touching the federal judicial system, frequently taking sharply different positions. With respect to the question on which the Court has invited briefs in this case, however, we are in solid agreement. In the exercise of its constitutional authority, Congress has directed that the federal habeas courts should independently apply the law to the facts of particular cases. We believe the Court will find our argument helpful in addressing its own question, and we do not believe that briefs by the other amici mentioned will make the same argument in the same way.

DATED this 4th day of March , 1992.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Larry W. Yackle", followed by a slanted line.

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ISSUE PRESENTED

In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination de novo?

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STATEMENT OF THE CASE

In this habeas corpus case from Virginia, the Court of Appeals for the Fourth Circuit awarded relief on the ground that the prosecution's evidence was insufficient to support conviction under the test established in Jackson v. Virginia, 443 U.S. 307 (1979). In addition to the issues the warden set forth in his petition, this Court asked the parties to brief an additional question: whether a federal habeas corpus court should "give deference" to a previous state court "application of law to the specific facts" of a petitioner's case or "review the state court's determination de novo." This brief focuses exclusively on the Court's own question.

STATEMENT OF INTEREST

A statement of interest is set out in the Motion accompanying this brief.

SUMMARY OF ARGUMENT

The question on which this Court has requested briefs is a question of statutory construction. Article III of the United States Constitution assigns the prescription of the inferior federal courts' jurisdiction to political judgments made by Congress. This Court has authoritatively construed the habeas corpus statutes to require de novo adjudication of cognizable claims in federal court. This interpretation has stood for decades, has been the basis for interim legislation, and should not be abandoned without congressional action.

The federal courts' jurisdiction to entertain habeas corpus petitions from state prisoners was established in 1867. Under the framework of that Act, habeas constitutes a specially defined mechanism for testing the legality of detention.

The federal courts do not directly review state criminal judgments, but rather entertain independent petitions from prisoners who challenge the legality of their custody. To perform its function, a federal court cannot defer to a previous judgment in state court, but is obligated to address afresh the prisoner's claim against current custody.

In Brown v. Allen, 344 U.S. 443 (1953), the Court held that the 1867 Act requires the federal courts to exercise independent judgment on the merits of cognizable claims, notwithstanding prior judgments in state court. Speaking for a majority in Brown, Justice Frankfurter stated explicitly that the federal courts must independently apply relevant legal standards to the facts of particular cases.

In amendments to the habeas corpus statutes in 1966 and 1977, Congress embraced Brown both explicitly and implicitly. Explicitly, Congress codified Brown in a new subsection (a) of 28 U.S.C. §2254, which provides that the federal courts "shall" entertain applications from prisoners who alleged they are in custody in violation of federal law, "pursuant to the judgment of a State court."

Implicitly, Congress codified Brown in two ways. First, in §2254(d), Congress created a presumption in favor of state findings of basic fact, but left the federal courts with authority to make independent determinations on questions of law and "mixed" questions of law and fact, i.e., the application of law to the facts in particular cases. Second, in amendments to 28 U.S.C. §2244, Congress

established a form of preclusion in favor of previous judgments in federal court, but not in favor of prior state court judgments.

Precedents regarding nonfederal and procedural grounds for dismissing habeas petitions do not affect the federal courts' longstanding authority to determine claims independently. Those cases govern the posture in which the federal courts should consider the merits--not the federal courts' authority, in a proper posture, to decide the merits de novo. Thus in Wainright v. Sykes, 433 U.S. 72 (1977), the Court explained that when claims are properly presented for determination on the merits, the federal courts continue to make their own independent judgments as established in Brown.

The decision in Stone v. Powell, 428 U.S. 465 (1976), which largely bars the federal courts from awarding relief on fourth amendment exclusionary rule claims, has no bearing on the question at bar. The Stone decision elaborated the exclusionary rule, not the jurisdiction of the federal courts in habeas corpus. The Court has refused to extend Stone's analysis to other claims--for the very reason that any such extension would violate the jurisdiction established by Congress.

Recent decisions such as Teague v. Lane, 489 U.S. 288 (1989), and Butler v. McKellar, 110 S.Ct. 1212 (1990), are also inapposite. Those decisions largely eliminate from the purview of habeas corpus a category of claims, namely claims that depend on "new rules" established after a prisoner's sentence

became final. They do not affect a federal court's classic obligation to determine the legality of a prisoner's current detention by applying rules that are not "new" and thus remain cognizable in habeas corpus. The federal courts continue to apply the law existing at the time a prisoner was in state court.

While the prisoner in Butler himself claimed that he was seeking only a de novo federal application of a settled rule to a different set of facts, this Court rejected that characterization and held, instead, that the prisoner was seeking the benefits of a "new" rule.

The Court should not reinterpret the habeas corpus statutes while Congress is actively reviewing bills that would reform the habeas jurisdiction. The political process should be allowed to run its course.

There is no emergency to require the Court to act immediately. Problems associated with capital cases are being addressed by the Judicial Conference and Congress. A report compiled by a subcommittee of the Federal Courts Study Committee refutes the charge that habeas corpus must be curbed to stem a flood of petitions in noncapital cases.

ARGUMENT

I. THE FEDERAL HABEAS CORPUS STATUTES REQUIRE THE FEDERAL COURTS INDEPENDENTLY TO APPLY FEDERAL LAW TO THE FACTS OF SPECIFIC CASES.

The Constitution distinguishes the judicial power to exercise jurisdiction in a case or controversy from the legislative power to confer jurisdiction in the first instance. Courts organized pursuant to Article III exercise the federal judicial power. But the "disposal of the judicial power...belongs to Congress." Turner v. Bank of North America, 4 U.S. (4 Dall.) 10 (1799), quoted in Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850).

The jurisdictional statutes Congress enacts are subject to authoritative construction here.¹ Commonly, the Court

¹ The briefs filed by the warden and some amici treat the Court's question as though it were open to resolution without

cooperates with the legislative branch to flesh out the specifics of jurisdictional systems, to ensure that the authority and responsibility Congress wishes the federal courts to have is exercised in an efficient and timely manner. Yet this Court cannot adopt rules that conflict with the policy judgment made by Congress. Habeas corpus for state prisoners fits this description.²

reference to Congress' primary authority. In this, they fail to appreciate that the issue before the Court is one of statutory construction.

² See Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543 (1985). Decisions regarding the exhaustion of state remedies, the effect of procedural default in state court, and multiple federal petitions from a single prisoner reflect this Court's efforts to orchestrate the exercise of the jurisdiction conferred by Congress. Recent cases in those fields have drawn criticism in some quarters, but they cannot be said to be in conflict with the basic structure of the jurisdiction Congress has created. They deal solely with the procedural requisites for

A. The 1867 Act

In 1867, Congress extended the federal courts' habeas corpus jurisdiction to cases in which petitioners complain of custody in the hands of state officials. 28 U.S.C. §2241. Historically, the nature of the claims for which the writ provides a remedy may have shifted. Yet there can be no question that with respect to claims that are cognizable, the federal habeas courts are obliged to apply the relevant law de novo.³ The rule of

obtaining federal adjudication of a claim on the merits; they do not limit the authority of the federal courts to determine the merits of claims that are properly presented. See pp. 33-36 *infra*.

³ In some cases prior to Brown v. Allen, *supra*, this Court said that the federal writ was available to raise only "jurisdictional" claims. See pp. 15-16 *infra*. And under recent decisions, claims depending on "new rules" of law have been eliminated from the scope of habeas corpus in most instances. See pp.

decision must be the habeas court's own judgment regarding applicable law, not a retrospective appraisal of whether the state courts, acted "reasonably" or in "good faith."⁴

37-52 *infra*. If a prisoner raises a claim that a federal habeas court is not authorized to address, he or she will be denied relief. The reason, however, is not that the federal court has addressed the claim and found it without merit--either independently or out of deference to a previous state judgment. It is that the claim simply is not cognizable in habeas corpus, and the federal court cannot address it at all.

⁴ These are the standards offered by the warden and other amici. Brief for the Petitioner at 18; Brief for the United States at 14. They are inconsistent with the very nature of habeas corpus. State judges rendering judgments on federal claims are not like state executive officers, who may assert a "good faith" defense to suits for damages. Cf. Anderson v. Creighton, 483 U.S. 635 (1987). The rationale for that defense is that executive officers might otherwise be deterred from performing their duties by the fear of personal liability. Judges risk no personal exposure when they decide cases. Moreover, Congress has not legislated with respect to official immunity, and

The structure of the habeas statutes makes this plain. The federal courts do not directly reexamine state criminal judgments, but rather entertain independent petitions from state prisoners who challenge the legality of their detention.⁵ It is this conceptual feature of the writ that makes habeas corpus "collateral" to any previous criminal proceedings. The federal court's task, then, is not to look back

the Court itself may have relative freedom to formulate doctrine in that field. Nor are state courts like federal administrative agencies, which may be entitled to deference in the interpretation of ambiguous statutes if Congress so provides. Chevron U.S.A. v. Nat. Res. Defense Council, 467 U.S. 837 (1984). Congress has not said that "reasonable" state court judgments are generally to be accepted, but, instead, has assigned to the federal courts a jurisdiction in habeas corpus independently to apply the law to the facts of specific cases.

⁵ 28 U.S.C. §§2241, 2242.

at actions taken in state court under a standard of review. It is rather to address the claim a petitioner actually raises, indeed, the only claim a petitioner can raise in habeas corpus: a federal claim against the legality of his or her current custody.

B. The 1948 Act

Respected opinion is divided over the speed by which this Court decided that the 1867 Act directs the federal courts to exercise independent judgment on the merits, whether or not the state courts committed "jurisdictional" error or gave prisoners an opportunity to press federal claims. The exchange between Justices Brennan and Harlan in Fay v.

Noia, 372 U.S. 391 (1963), is the classic illustration.⁶

In the 1940s, there were proposals to amend the 1867 Act to require the federal courts to defer to state judgments.⁷ Congress actually enacted

⁶ Professor Bator contended that the principle of independent federal adjudication was not clearly established until 1953. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963). Others disagree. E.g., Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. C.R.--C.L. L. Rev. 579 (1982); Saltzburg, Habeas Corpus: The Supreme Court and the Congress, 44 Ohio St. L.J. 367, 381-82 (1983), citing, e.g., House v. Mayo, 324 U.S. 42 (1945); Mooney v. Holohan, 294 U.S. 103 (1935). Professor Wechsler reads Moore v. Dempsey, 237 U.S. 309 (1923), to have held that "the habeas court had a duty to adjudicate the merits" of a "mob domination" claim. Wechsler, Habeas Corpus and the Supreme Court: Reconsidering the Reach of the Great Writ, 59 U. Colo. L. Rev. 167, 173 (1988).

⁷ See Winkle, Judges as Lobbyists: Habeas Corpus Reform in the 1940's, 68 Judicature 263 (1985).

few innovations touching habeas in the 1948 revision of the Judicial Code.⁸ Then this Court took up the consolidated cases in Brown v. Allen, supra, in which Justice Reed's majority opinion addressed and decided the very question on which this Court has invited briefs: what effect should a federal court give to a prior state court decision rejecting a prisoner's federal claim on the merits? The Court said:

[T]he state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort in another jurisdiction... It is not res judicata. Id. at 458.⁹

⁸ The most important was the codification of the exhaustion doctrine previously established in Ex parte Royall, 117 U.S. 241 (1886). 28 U.S.C. §2254. See H. Rep. No. 308, 80th Cong., 1st Sess. (1947).

⁹ Another amicus contends that this reference to res judicata suggests that the Court in Brown equated the effect of a prior state judgment with the effect of

Next, the Court turned to the cases at hand and independently applied federal legal standards to the facts in each instance. Individual justices divided over the proper disposition of the consolidated cases in Brown, but only Justice Jackson disagreed with the Court's interpretation of the 1867 Act to call for de novo federal adjudication. A majority not only joined Justice Reed's statement regarding the effect of prior state judgments, but also endorsed the

a previous federal judgment as outlined in Salinger v. Loisel, 265 U.S. 224 (1924). Brief for the Criminal Justice Legal Foundation at 15. That argument is quite wrong. The Court in Brown recognized that neither a prior federal nor a prior state judgment was preclusive in the rigid sense of ordinary res judicata rules, but that a previous federal judgment would typically cut off a later petition while a previous state judgment would not. Initial federal petitions (albeit filed after judgment in state court) have always been handled on a separate track from second or successive federal petitions.

elaboration of that interpretation in a separate opinion by Justice Frankfurter.¹⁰

¹⁰ The warden and an amicus contend that Justice Frankfurter's opinion was "at odds" with that of Justice Reed. Brief for the Petitioner at 11 n.5; Brief for the Criminal Justice Legal Foundation at 14-16. Justice Reed did refer to the federal courts' "discretion" to entertain petitions from state prisoners, but it is a distortion to suggest that he meant that when the district courts below had treated prisoners' claims de novo, and when the Court itself did the same, it was because the confession and race discrimination claims presented in Brown were so compelling or systemically important as to warrant a special, discretionary departure from a general rule of deference to state judgments. The majority opinion in Brown clearly contemplated that the federal courts had power to address claims on the merits--and were expected to use it.

The allocation of business among the opinions in Brown was a function of a different internal debate over whether this Court's previous denial of certiorari on direct review should bar consideration of the merits in the district courts. Justice Reed took the minority position on that question. Justice Frankfurter then elaborated on "the bearing of the proceedings in the State courts upon the disposition of the

Ever sensitive to state interests, Justice Frankfurter nonetheless recognized the separation-of-powers principle at stake:

It is not for us to determine whether this power should have been vested in the federal courts....[T]he wisdom of...a modification in the law is for Congress to consider....Id. at 499-500.

In these explicit terms, Justice Frankfurter grounded the decision in Brown firmly on an interpretation of statute and recognized that judge-

application for a writ of habeas corpus in the Federal District Courts"--a matter on which a majority was agreed. Id. at 497 (opinion of Frankfurter, J.) (explaining that the "views of the Court" could be "drawn from the two opinions jointly"). Notwithstanding the doubts the warden hopes to create regarding Justice Frankfurter's opinion, the fact remains that both this Court and Congress have accepted it as authoritative. See pp. 22-27 *infra*. The warden cannot prevail on the question before the Court today by simply ignoring what Brown has always been understood to mean.

fashioned rules to govern the process by which the federal courts exercise their statutory jurisdiction cannot legitimately undercut the substance of the authority that Congress has concluded should be theirs:

All that has gone before is not to be ignored as irrelevant. But the prior State determination of a claim...cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have....Id. at 500 (emphasis supplied).

The independent judgment the federal courts are to exercise clearly extends to the application of legal principles to the facts of a particular case. The federal courts may be guided by the state record, and in many cases a prisoner's legal claim may turn on "basic facts...(in the sense of a recital of external events and the credibility of

their narrators)...,[which may] have [been] tried and adjudicated against the applicant [in state court]." But:

Where the ascertainment of the... facts does not dispose of the claim but calls for interpretation of the legal significance of such facts,...the District Judge must exercise his own judgment on this blend of facts and their legal duties. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge...." Id. at 507-08 (emphasis supplied).

The construction the Court placed on the 1867 Act in Brown has been questioned.¹¹ Yet whether or not one

¹¹ Judge Parker had argued that the exhaustion doctrine should not merely postpone federal adjudication of the merits, but should foreclose federal habeas corpus at any time. Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 176 (1948). This Court rejected that view in Brown. A rule of timing that requires prisoners to pursue state relief before filing a federal petition presupposes that when state remedies have been exhausted, federal adjudication will be available. The

agrees with the Court's work in 1953, the critical point now is that Brown did place an authoritative interpretation on the Act--an interpretation that has stood for decades. The question on which this Court has now sought advice invites a frontal assault on Brown and all the developments in the law of habeas corpus since Brown. For both the legislation Congress has enacted over the last forty years and the decisions this Court has rendered are intelligible only against the baseline established by Brown.

After Brown, Congress rejected several plans that would have had the federal courts defer to state decisions on federal claims if prisoners received a

state courts may be the first courts to address a federal question, but their judgments cannot be given deference without a fundamental distortion of the exhaustion requirement.

"fair and adequate" opportunity to litigate in state court.¹² Then, in Fay v. Noia, supra, and other decisions in 1963, the Court confirmed that the federal courts are not to defer to previous state court applications of law to particular fact patterns.¹³

¹² E.g., H.R. 5649, 84th Cong., 1st Sess. (1955), discussed in Pollak, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale L.J. 50 (1956). See also Report of the Committee on Habeas Corpus, 33 F.R.D. 367 (1964).

¹³ Fay v. Noia, supra; Townsend v. Sain, 372 U.S. 293 (1963); Sanders v. United States, 373 U.S. 1 (1963). While Justice Harlan dissented from the majority's treatment of state judgments resting on nonfederal grounds, he recognized that Brown had decided that when the merits were not procedurally foreclosed, a federal habeas court "had the right and duty to satisfy itself of the correctness of the state decision." Noia, supra at 461 (emphasis supplied). In a separate dissent, Justice Clark accepted Brown's reading of the habeas statutes and recognized that if the law was to be changed, Congress would have to do it. Id. at 447-48.

C. The 1966 Act

When Congress did enact new habeas legislation in 1966, it did not curtail the federal courts' authority to make independent judgments on federal claims. Instead, Congress amended the 1867 Act in a way that can only be understood to track this Court's 1963 decisions with respect to the substantive scope of the federal courts' authority.¹⁴ Cf. Stone v. Powell, supra at 536-37 (1976) (White, J., dissenting).

First, the 1966 Act amended §2254 by moving the existing paragraphs (on the exhaustion doctrine) into subsections, (b) and (c), and by adopting an explicit articulation of the federal courts' authority to entertain petitions from state prisoners in a new subsection (a):

¹⁴ Pub. L. 89-711, 80 Stat. 1104-05 (1966).

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

This language, enacted only three years after Noia, Townsend, and Sanders, and amid calls for the repudiation of Brown, cannot fairly be read to contemplate that the federal courts will defer to prior state judgments. On its face, the new statute explicitly confirms the federal courts' obligation to receive properly presented petitions from state prisoners, to test the basis of petitioners' custody for federal error, and to cure any error they find. To read this language to contemplate deference to the state courts would be to thwart the clear congressional policy it represents.

We read §2254(a) to codify Brown, and, indeed, we think that is the way this Court has always read it.¹⁵

Any doubts about this conventional interpretation of subsection (a) are resolved by the other innovations in the 1966 Act, which implicitly take Brown as a benchmark. A new subsection (d), added to §2254, isolates state determinations of "factual" issues and instructs the federal courts to presume such judgments to be correct, if reached in a procedurally acceptable manner. If it had been intended that the federal courts would defer not only to the state courts' factual findings, but to their legal

¹⁵ In light of the 1966 Act, it is incorrect to contend that the federal courts' authority to apply the law to facts rests on an inference from congressional "silence" since Brown. E.g., Brief for the Criminal Justice Legal Foundation at 18.

conclusions as well, subsection (d) would scarcely have been limited explicitly to factual issues. The clear implication is that state decisions on the merits of prisoners' legal claims would not be entitled to deference.

Both the Judicial Conference committee that suggested subsection (d) and the congressional committees that reported it to the floor distinguished between state factual findings, to which the new law would apply, and state declarations of legal principles and the application of law to facts--to which subsection (d) would not apply.¹⁶

¹⁶ H. Rep. No. 1892, 89th Cong., 2d Sess. (1966); S. Rep. No. 1797, 89th Cong., 2d Sess. (1966). A plan that would have given state factual findings preclusive effect was rejected on the ground that it would have been "wholly incompatible with the duty of the Federal courts to determine Federal constitutional questions." Report of the Committee on Habeas Corpus, 33 F.R.D.

This Court has held that the "ultimate question" of the merits of a claim is open to independent judgment by the federal courts. Legal questions, or "mixed" questions of law and fact, are "not governed" by subsection (d). Sumner v. Mata, 455 U.S. 591, 597 (1982); accord Miller v. Fenton, 474 U.S. 104 (1985).¹⁷ A decision to instruct the

367, 379-80 (1964).

¹⁷ In some instances, the Court has divided over whether to characterize issues as factual (and thus subject to the statutory presumption) or legal or "mixed" (and thus open for independent federal consideration). It is one thing, in a close case, to put an issue in the category of "fact" when others would have placed it on the other side of the fact/law line. It would be quite another thing to ignore the fact/law line altogether, when Congress has employed that line to make allocations of authority between the state and federal courts.

The United States suggests that the Court itself should jettison the fact/law distinction employed by §2254(d) in order to prevent unscrupulous prisoners from

federal habeas courts to defer to state court applications of law to facts could be rendered only in the teeth of the language in subsection (d), the legislative history behind it, and this Court's interpretations of it.¹⁸

obtaining a federal forum to which they are not entitled simply by recasting their claims to depend on "mixed" issues. Brief for the United States at 17-18. It is not for a litigant to control a federal court's handling of a case under the §2254(d), but for the court itself to characterize a claim for purposes of the statute.

¹⁸ An amicus suggests that once it is recognized that the fact/law distinction is used in §2254(d) to allocate judicial authority, it follows that the Court should begin by deciding which court, state or federal, it thinks should determine a question and then characterize the question as factual or legal accordingly. Brief of the Criminal Justice Legal Foundation at 27. There is language in Miller v. Fenton, supra, acknowledging that forum-allocation concerns inform the Court's decisions under §2254(d). But nothing in that case suggests that the Court does or can simply substitute its own forum-allocation choices for determinations of whether questions are factual, legal, or

The last innovation in the 1966 Act also implicitly recognizes Brown as its premise. In amending §2244, dealing with successive federal petitions, the 1966 Act did introduce into habeas corpus a "qualified" form of res judicata. S. Rep. No. 1797, supra at 4. If Congress had meant to establish any such rule of deference in favor of prior state judgments, the 1966 Act would scarcely

"mixed." The holding in Miller that the voluntariness of a confession is a "mixed" issue for independent federal consideration makes clear that the fact/law distinction, difficult as it may be to draw in some cases, has its own substantive content. Since Congress has decided that the fact/law distinction should govern the allocation of authority between the state and federal courts, the federal courts must draw that distinction fairly and thus give effect to congressional judgment. To argue otherwise is to argue that the square holding in Miller must be overruled--which is precisely what the warden and the United States propose. Brief for the Petitioner at 18-19 n.10; Brief for the United States at 17 n.6.

have, simultaneously, added subsection (a) to §2254 (and thus underscored the availability of habeas corpus after a judgment in state court), and established a form of preclusion for multiple federal petitions in §2244.¹⁹

D. The 1977 Rules

The only relevant legislative action regarding habeas corpus since 1966 has been the adoption of the Habeas Corpus Rules in 1977. If it had been imagined that state judgments would be entitled to deference (beyond the respect recognized in Brown), it would hardly have made sense to establish an elaborate set of procedural rules to streamline the

¹⁹ In this way, too, Congress has recognized since Brown that previous state judgments are not to be treated in the manner of previous federal judgments. See note 9 supra. Cf. 28 U.S.C. §2244(c), also added in 1966 to give preclusive effect to previous judgments by this Court.

processing of federal habeas cases.²⁰ The central purpose of the rules was to eliminate procedural barriers to efficient federal determinations of the merits of claims.

This Court's longstanding interpretation of the habeas statutes to require independent federal adjudication of federal claims has been confirmed by interim legislation and should not now be abandoned without further congressional action.

E. Claims Barred on Procedural Grounds

The Court has recently tightened the procedural requirements prisoners must meet in order to place claims before the district courts. E.g., Coleman v.

²⁰ See Hearings on H.R. 15319 Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 94th Cong., 2d Sess. 104 (1976); H. Rep. No. 1471, 94th Cong., 2d Sess. (1976).

Thompson, 111 S.Ct. 2546 (1991)

(reinforcing the rules restricting prisoners' ability to seek federal relief on claims that were not raised properly in state court); McCleskey v. Zant, 111 S.Ct. 1445 (1991) (placing similar limits on successive federal petitions from a single petitioner). Nothing in those cases departs from the understanding that the federal courts exercise de novo judgment regarding the application of law to facts.

Cases like Coleman, supra (dealing with procedural default in state court) govern the posture in which a federal court may treat the merits of a claim rather than the court's obligation, in a proper posture, to exercise independent judgment on the merits. Thus in Wainwright v. Sykes, supra, the Court explained that it "in no way changed" the

substantive scope of the federal courts' responsibility:

[T]he...petitioner...is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in state proceedings. Id. at 87 (emphasis supplied).²¹

The cases on the "abuse of the writ" doctrine regarding successive federal petitions are similar. The Court explained in McCleskey, supra at 1462, that the federal courts consider the merits of claims "presented in a proper procedural manner." Here, too, this Court's decisions on the procedural posture in which claims must be presented

²¹ If federal consideration of the merits of the claim in Sykes had not been barred, that claim under Miranda v. Arizona, 384 U.S. 436 (1966), would have been open for de novo review--which, of course, would have meant applying the Miranda rules to the facts of the case. See, e.g., Duckworth v. Eagan, 492 U.S. 195 (1989).

presuppose that, when claims are properly presented, the federal courts will determine the merits independently.

F. Claims Based on the Fourth Amendment Exclusionary Rule

Nor does Stone v. Powell, supra, undermine the district courts' authority to adjudicate federal claims afresh. Stone bars federal relief on a fourth amendment exclusionary rule claim, unless the prisoner was denied an opportunity for "full and fair" litigation in state court. Yet in Stone this Court explicitly disclaimed any purpose to change the federal courts' jurisdiction in habeas corpus. 428 U.S. at 494-95 n.37.²² Despite arguments that a

²² The decision in Stone was not an interpretation of the habeas statutes at all. It was an elaboration of the exclusionary rule. Id; Allen v. McCurry, 449 U.S. 90, 98 (1980). See Wechsler, supra at 176; Wright, Habeas Corpus: Its History and Its Future, 81 Mich. L. Rev.

similar analysis should be applied to other claims, the Court has held Stone to its exclusionary rule moorings--because an extension would conflict with the habeas statutes enacted by Congress. E.g., Rose v. Mitchell, 443 U.S. 545 (1979).²³

G. Claims Based on New Rules

The warden and some amici contend that the Court's decisions on the "retroactive" effect of "new rules" of law establish a rule of deference to the

802, 807 (1983).

²³ After all, the "full and fair adjudication" standard invoked with respect to exclusionary rule claims in Stone is the standard conventionally associated with preclusion under the full faith and credit statute. 28 U.S.C. §1738. See Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982). Habeas corpus is an express statutory exception to §1738. Id. at 485 n.27; Allen v. McCurry, supra at 98 n.12.

state courts.²⁴ Those decisions are inapposite. They eliminate from the purview of habeas corpus a category of claims, namely claims that depend on genuine changes in the substantive content of legal rules after a prisoner's sentence became final on direct review. They do not affect a federal court's classic function in habeas corpus to inquire into the legality of a prisoner's current detention by applying settled rules to the facts.

To be sure, some descriptions of "new rules" in recent decisions are quite broad. For example, in explaining why the rule in Butler, supra, was "new" for habeas purposes, the Chief Justice said that, at the time the petitioner's case

²⁴ Teague v. Lane, supra; Butler v. McKellar, supra; Saffle v. Parks, 110 S.Ct. 1257 (1990); Sawyer v. Smith, 110 S.Ct. 2822 (1990).

was in state court, the rule he advanced had been "susceptible to debate among reasonable minds." Butler, 110 S.Ct. at 1217.²⁵

It is quite wrong, however, to take this language out of the context in which it was used and to understand Butler to address not a change in the content of a rule, but a disagreement over the application of an unchanged rule. The principle underlying the Teague line of cases is that the federal habeas courts sit to ensure that the state courts respect and apply federal law as it is when cases come before them--not as it may be in the future. Thus federal habeas corpus is not available to address

²⁵ Cf. Sawyer, 110 S.Ct. at 2827 (referring to "gradual developments in the law"). But see Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (referring to a "clear break" from precedent).

claims that require the announcement or application of a change in the law since the prisoner's convictions became final.

The Butler decision only implements the analysis in Teague. In Edwards v. Arizona, 451 U.S. 477 (1981), the Court excluded a confession obtained after a suspect had refused to answer questions without a lawyer present. The prisoner in Butler contended that his statement, too, was excludable, even though, in his case, the interrogation had continued with respect to a different offense. The petitioner in Butler described his argument as a request that the rule announced in Edwards be applied to a "different set of facts." Butler, 110 S.Ct. at 1217. Yet that characterization was plainly rejected. No matter how the prisoner himself couched his argument, it was for the district court in the first

instance, and this Court on appeal, to determine the true character of the claim. In fact, the Court held that the prisoner was not seeking the application of a settled rule to an analogous fact pattern, but rather was seeking the benefits of a "new rule."²⁶

²⁶ E.g., Arizona v. Roberson, 486 U.S. 675 (1988) (finding such a claim meritorious--but only after the Butler petitioner's conviction had become final). The proper characterization of the rule on which a petitioner relies can present a close issue. The Court's decision in Butler has been criticized. E.g., Fallon & Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1733, 1747-48 (1991). And the warden in the instant case complains that the Fourth Circuit should have decided that Mr. West actually seeks to establish a "new" rule against inferring theft from possession--instead of an application of the settled rule in Jackson v. Virginia. Yet the possibility that decisions may be questioned hardly suggests that the courts that render them are not doing what they purport to be doing. See note 17 supra.

The warden ascribes to Butler a purpose never mentioned in the Court's opinion, namely an extension of the analysis initiated in Teague "beyond an ordinary concept of non-retroactivity." Brief for the Petitioner at 18. It would be dangerous business to ascribe any such hidden agenda to Butler.

If the warden is correct, this Court has already reinterpreted the habeas statutes to preclude federal treatment of the merits, provided the state courts act "reasonably." Brief for the Petitioner at 16. If this is true--if the Court has already grappled with the terms of the 1867 Act, longstanding interpretations of that Act, and the effects of the 1966 amendments--the Court has done all this sub silentio. While many recent decisions refer to the statutory scheme that controls habeas corpus, none states

that the habeas statutes now mean that the federal courts must defer to "reasonable" state court applications of federal law.

If the warden is right, the definition of a "new rule" no longer serves the function it was assigned in Teague. In Teague, that definition identified what law a federal court could employ in order to adjudicate a claim. Now, according to the warden, the "new rule" definition no longer specifies the content of the legal standards that can be enforced in federal habeas corpus, but, instead, prescribes a standard of review by which the federal courts are to examine a previous state judgment.

This moves too far, too fast, on too little. Teague and Butler do not revolutionize the very nature of habeas corpus under the 1867 Act. They carve a

category of claims out of the purview of habeas (claims resting on changes in the law) and leave intact the federal courts' longstanding authority to adjudicate the claims that remain (claims resting on settled law).

If the warden is right, it would seem to follow that nearly every rule is "new" for purposes of habeas corpus-- either because the state courts might reasonably have employed a different rule, or because a settled rule applied to the facts of a particular case makes "new" law for that case. Here again, the warden has reached an implausible conclusion by piecing together statements taken out of context. The very point of identifying some rules as "new" must be to distinguish them from other, settled rules. In context, the quotations the warden takes from Teague, Butler, and

Parks, supra, presuppose that some rules are not "new" at all.²⁷ Accordingly, they continue to be applied by the federal courts in the de novo manner prescribed by statute.²⁸

If the "every-rule-is-a-new-rule" theme is pressed, as it is by the warden and other amici, it leads to the untenable conclusion that the federal courts make "new" law every time they

²⁷ E.g., Teague, supra at 309 (referring to "constitutional rules [that were] not in existence at the time a conviction became final") (emphasis supplied); Sawyer, supra at 2827 (distinguishing rules "in existence at the time the conviction became final" from "later emerging legal doctrine").

²⁸ E.g., Penry v. Lynaugh, 492 U.S. 302 (1989). See Teague, supra at 306, quoting Justice Harlan in Mackey v. United States, 401 U.S. 667, 679 (1971) (stating that the federal courts should "apply the law prevailing at the time a conviction became final").

decide a case.²⁹ That conclusion, in turn, confuses what are conventionally thought to be "pure" legal questions with "mixed" questions of law and fact. Since Brown v. Allen, both this Court and Congress have recognized that the boundary between purely legal and "mixed" issues can be difficult to police. That is why both kinds of questions are open

²⁹ This Court's precedents reflect no such radical understanding of law and legal method. Certainly, Justice Harlan thought that the decision on the novelty of a rule would often be close. In his view, the "content" of constitutional principles rarely changed "dramatically from year to year." Moreover, what might appear on first glance to be the announcement of a "new rule" might, instead, be "simply" the application of a "well-established constitutional principle" to a "closely analogous" case. Desist v. United States, 394 U.S. 244, 263 (1969) (dissenting opinion). See Mishkin, Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 60 (1965) (stating that "courts...handle the vast bulk of cases by application of preexisting law").

for de novo federal adjudication under the habeas statutes.

The warden and the United States, by contrast, now contend that since "all" purely legal issues are foreclosed in habeas corpus by Teague and Butler, and since the line between those questions and "mixed" issues is often unclear, the Court should channel both "pure" and "mixed" questions to the state courts in the manner that §2254(d) funnels questions of fact in that direction. Brief for the Petitioner at 22; Brief for the United States at 13.

This is untenable. Again, under the Teague line of cases on "retroactivity" the federal courts continue to apply settled law, but do not entertain claims depending on changes in the law. It defies the premise of the Teague decisions to take the Court's words out

of the "retroactivity" context and to read them to undercut the very habeas corpus jurisdiction Teague presupposes.

The warden and the United States openly invite the Court to cease distinguishing among legal, factual, and "mixed" questions. Yet the statute now on the books does not treat legal and "mixed" issues in the way it treats questions of fact. Instead, §2254(d) draws common distinctions among those kinds of questions and relies on those distinctions to allocate authority between the federal and state courts.

Nor can the Court simply ignore conventional distinctions among legal, factual, and "mixed" questions in the habeas context without regard for repercussions in other fields in which these distinctions have always made a difference. A lot of things may have to

be done to decide whether there was enough evidence to convict Frank West of larceny in Westmoreland County, Virginia. A fundamental reworking of legal categories in which American lawyers and judges have expressed their thinking time out of mind is not one of them.³⁰

Finally, if Butler has already terminated the federal courts' authority to decide "mixed" questions, numerous recent precedents must be taken to have been overruled--again sub silentio. Not

³⁰ To the extent this Court decides in close cases that prisoners actually are attempting to establish or rely on "new" rules, and to the extent the Court concludes that issues are factual rather than "mixed," the state courts' authority to decide issues will be enhanced. Yet there is a critical, constitutionally grounded, difference between implementing a set of legislatively prescribed distinctions in a way that may be controversial in individual instances, and failing to accept those distinctions at all. That difference is at the root of the issue the Court asked the parties to brief.

only has the holding in Miller v. Fenton,
supra, been discarded, but the analysis
the Court has always used in §2254(d)
cases has equally been jettisoned. E.g.,
Cuyler v. Sullivan, 446 U.S. 335 (1980)
(holding that the effectiveness of
counsel is a "mixed" question for de novo
federal determination). Indeed, since
all the Court's important decisions
regarding §2254(d) were handed down prior
to Teague and Butler, none of them is
apparently any longer to be relied upon.
If the warden is right, the Court
overruled all those cases by defining a
"new rule" for "retroactivity"

purposes.³¹ This proves entirely too
much. It cannot be sustained.

Moreover, if the warden is right,
the Court has acted in an extraordinary
way of late--by continuing itself to
apply the law to the facts in specific
habeas cases, notwithstanding Butler.
See, e.g., Estelle v. McGuire, 112 S.Ct.
475 (1991) (independently determining
whether the facts in a particular case
made out a due process violation); Lewis
v. Jeffers, 110 S.Ct. 3092 (1990)
(applying settled precedents regarding
the eighth amendment to the facts of a

³¹ If the Court's supposed pattern
of sub silentio overruling stretches back
to Teague, the internal division in
Duckworth v. Eagan, supra, is
unintelligible. For if law-application
claims were already banished, there
should have been no further need to
debate whether the analysis of fourth
amendment claims in Stone v. Powell,
supra, should be extended to Miranda
claims. Yet there plainly was reason to
debate that question.

particular habeas case); Penry v. Lynaugh, supra (same).

In fact, nothing has changed regarding the federal courts' authority to entertain cognizable claims and, in so doing, to apply relevant legal standards to the facts of particular cases. The interpretation of the habeas corpus statutes in Brown v. Allen remains the law. If the scope of the federal courts' jurisdiction is to be changed, that change must come from Congress.³²

³² Several recent bills introduced in Congress would narrow the definition of "new rules" for purposes of the Teague line of cases. The pending crime bill, H.R. 3371, would define a "new rule" as a "clear break from precedent, announced by the Supreme Court of the United States, that could not reasonably have been anticipated at the time the claimant's sentence became final in state court." See also H.R. 4737, 101st Cong., 2d Sess. (1990); H.R. 5269, 101st Cong., 2d Sess. (1990). Relevant committee reports explain that the bills are meant to avoid the definition suggested by Butler, supra. H. Rep. 102-242, 102d Cong., 1st

II. THE COURT SHOULD NOT REINTERPRET THE HABEAS STATUTES WHILE CONGRESS IS DEBATING PROPOSALS FOR REFORM.

Even if existing statutes were not so clear as they are, this would not be the season for this Court to reinterpret those statutes. Bills bearing on the issue on which this Court has invited briefs are under active review in Congress. Moreover, perhaps because of the procedural decisions the Court has rendered in recent years, the rate of habeas petitions from state prisoners is now on the decline.

Ordinarily, the pendency of related bills should not prevent this Court from

Sess. 130-31 (1991); H. Rep. 101-681, 101st Cong., 2d Sess. 125 (1990). The definition in H.R. 3371 was included in the House bill this year. It has been adopted by the conference committee appointed to reconcile the Senate and House bills, 137 Cong. Rec. H11691, approved again in the House, id. at H11756, and now awaits Senate action.

construing existing statutes as needed in cases accepted for review. In this instance, however, Congress is debating bills going to the jurisdiction of the federal courts, a matter peculiarly within the legislative competence and sounding in the separation of powers. The parties have not raised the question of the effect the federal courts should assign to state applications of law. Nor is it essential to engage that question to decide the issue on which this case turns, namely whether there was sufficient evidence to convict Mr. West.

We submit, therefore, that the Court should avoid the appearance of reaching out to do by judicial decision what the President and allied members of Congress

have been unable to do by legislation.³³

³³ An amicus contends that the state courts are now better than they used to be and that it would be "fitting" for "this Court" to hold that federal adjudication is "inappropriate" in most instances. Brief for the Attorney General of Florida at 2, 8. If it is true that the circumstances that caused Congress to confer jurisdiction on the federal courts no longer obtain, it is for Congress to amend the controlling statutes. State attorneys general are entitled to address their arguments to Congress and, in fact, have done so. E.g. Hearings on S. 635 Before the Senate Judiciary Committee, 102d Cong., 1st Sess. 9 (1991) (typewritten statement of Daniel E. Lungren of California) (stating that habeas corpus was "created by Congress and expanded through judicial construction" and that "only the Congress can repair the problems...we are now experiencing"). Cf. Hearings on H.R. 1400 Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 102d Cong., 1st Sess. 7 (1991) (typewritten statement of Andrew G. McBride, Assoc. Deputy Attorney General of U.S.) (stating that "Congress should adopt a...rule of deference to state court determinations of law and the application of law to facts").

A. Current Debates in Congress

Most bills debated recently seek primarily to resolve the vexing problems generated by capital litigation. Every bill that has advanced to the floor of either chamber has included, in whole or in part, the recommendations of a committee of the Judicial Conference, chaired by Justice Powell.³⁴ The Powell Committee plan would leave the present scope of the federal courts' substantive judgment unchanged, but would

³⁴ Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (1989). See S. 1757, 135 Cong. Rec. S13474; Hearings on S. 1757 Before the Senate Committee on the Judiciary, 101st Cong., 1st Sess. 119 (1989). Elements of the Powell Committee's plan were incorporated in an omnibus crime bill in the 101st Congress. S. 1970, 136 Cong. Rec. S6882. The House rejected several reform measures in favor of a substitute, which contained the Powell Committee report verbatim. 136 Cong. Rec. H8881.

make procedural adjustments to streamline the processing of capital cases.³⁵

Some bills contain provisions such as the President's proposal to bar the federal courts from awarding relief on a claim that was "fully and fairly adjudicated" in state court.³⁶ A change of that kind would take square aim at Brown v. Allen, supra.³⁷

³⁵ The Judicial Conference has embraced some of the Powell Committee's proposals and amended the committee report in other respects. Administrative Office of U.S. Courts, News Release, March 14, 1990; see Hearings on H.R. 4737 Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary, 101st Cong., 2d Sess. 137 (1990) (statement of Judge Donald P. Lay).

³⁶ S. 635, 102d Cong., 1st Sess. (1990), 137 Cong. Rec. S3192; H.R. 1400, 102d Cong., 1st Sess. (1990), 137 Cong. Rec. H1669.

³⁷ A Justice Department commentary on the President's program specifically states that the purpose is to amend the habeas corpus statutes in order to

Some proponents of the President's plan contend that adjudication would not be "full and fair" in the "intended sense" if the decision reached in state court fails to "reflect a reasonable disposition in light of the facts found and the rule of law applied." S. Rep. No. 98-226, 98th Cong., 1st Sess. 25 (1983). So understood, the plan would implicate the question now before the Court. The idea appears to be that a federal court should not grant relief to a prisoner even if the court concludes that the state courts were wrong, but only if they were unreasonably wrong.

In the first session of this Congress, the Senate adopted the full-

displace this Court's interpretation in Brown and substitute "a more limited standard of review." United States Department of Justice, The Comprehensive Violent Crime Control Act of 1991: A Summary 25 (1991).

and-fair-adjudication formula as part of an omnibus anti-crime bill. It was not included in the House crime bill, however, and an amendment containing it was defeated on the floor. The conference committee also rejected the full-and-fair-adjudication program and embraced, instead, the habeas reform plan in the House-passed bill. The House has adopted the conference bill, but the Senate has not yet acted on it.³⁸

If this Court is "to stay, and to appear to stay, above the hue and cry" of politics, the legislative process in Congress must run its course. Monaghan, The Burger Court and "Our Federalism," 43 Law & Contemp. Probs. 39, 49-50 (1980).

³⁸ See note 32 supra.

B. The Declining Rate of Habeas Petitions
from State Prisoners

There is no compelling reason for the Court to press ahead of Congress. The serious problems with the current system occur only with respect to capital litigation, and Congress shows every intention of enacting legislation to reduce the stress in those cases.

Noncapital cases, like this case from Virginia, present no urgency. A subcommittee of the Federal Courts Study Committee recently concluded that the data "do not support" the charge that the federal courts are "staggered by an ever-increasing flood" of petitions.³⁹ While the absolute numbers of petitions have risen slightly in recent years, the

³⁹ Report of the Subcommittee on the Federal Courts and Their Relation to the States, I Federal Courts Study Committee, Working Papers and Subcommittee Reports 468 (1990).

prison population has increased "dramatically"--by 469% between 1944 and 1987. Report, supra at 469. Thus "habeas corpus filings per state prisoner remained fairly constant from 1945 to 1962, rose dramatically until 1970, and have declined steadily ever since." Id. at 470-71 (emphasis supplied).⁴⁰ This downward trend in the rate of habeas filings, "whatever its cause,...refutes

⁴⁰ The number of petitions per hundred prisoners has followed this pattern: 1945--0.47; 1961--0.52; 1970--5.05; 1988--1.85. Meanwhile, the number of federal judges has increased. Report, supra at 10 (counting 321 Article III judges in 1955 and 699 in 1988, an increase of more than 100%). Writing before the decisions in Coleman v. Thompson, supra, and McCleskey v. Zant, supra, the subcommittee ascribed the drop in the rate of petitions to this Court's procedural decisions "making habeas corpus more difficult to obtain." Report, supra at 471. If that judgment is accurate, the actions the Court has already taken have had a significant impact on the size of the federal habeas caseload.

the claim that reform is necessary to stem the flood of petitions...." Id. at 472. The Court can and should await the results of the political process--to which the prescription of federal court jurisdiction is constitutionally assigned.

CONCLUSION

For the reasons stated above, we respectfully urge the Court to confirm that a federal court considering a habeas corpus petition from a state prisoner should not give deference to a previous state court application of law to the specific facts of the case.

Respectfully submitted,

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Counsel for Amicus Curiae

MOTION FILED
MAR 4 1992

(11)
No. 91-542

IN THE
Supreme Court of the United States
OCTOBER TERM 1991

ELLIS B. WRIGHT, JR., *et al.*,
Petitioners,
v.
FRANK ROBERT WEST, JR.,
Respondent.

**MOTION FOR LEAVE TO FILE BRIEF
AND BRIEF *AMICI CURIAE*
OF BENJAMIN R. CIVILETTI, NICHOLAS
deB. KATZENBACH, EDWARD H. LEVI,
ELLIOT L. RICHARDSON, *et al.* IN SUPPORT
OF THE RESPONDENT**

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QUESTION PRESENTED

This brief will address the following question:

In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination de novo?

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No. 91-542

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

ELLIS B. WRIGHT, JR., WARDEN, et al.,
Petitioners,

v.

FRANK ROBERT WEST, JR.,
Respondent.

MOTION OF BENJAMIN R. CIVILETTI,
NICHOLAS deB. KATZENBACH, EDWARD H.
LEVI, ELLIOT L. RICHARDSON, et al.
FOR LEAVE TO FILE BRIEF

The 66 individuals listed on the inside front page hereby move, pursuant to Rule 37.4, for leave to file the attached brief amici curiae in support of the Respondent. The Respondent has consented to the filing of this brief and has filed a letter to that effect with the Clerk of

the Court. The Petitioners have declined consent and have so notified the Clerk. The Respondent did not decline consent for any of the amici briefs filed in support of the Petitioner.

Amici are distinguished citizens who collectively have an extraordinary wealth of knowledge, experience and insight regarding the principal issue in this case. They include four former Attorneys General of the United States, eleven former members of Congress, two former governors, six former state attorneys general, eleven former state appellate court judges, five former federal judges, three former United States Attorneys, and four former presidents of the American Bar Association. They also include legal scholars, practicing lawyers and leaders in other professions. Their common interest and concern is that federal habeas review continue to

be available to state prisoners who have been unconstitutionally convicted and sentenced.

The brief of these amici addresses at least two issues that they believe are not being addressed to the same extent by the parties or the other amici. The attached brief discusses in some detail the language and legislative history of the 1966 amendments to the federal habeas statute and demonstrates that Congress in those amendments adopted the de novo standard for review of federal constitutional issues. The brief also provides important argument and statistical data, not presented elsewhere, showing that there have been no "changed circumstances" that would warrant the adoption of a deference standard of review.

For these reasons, amici curiae respectfully request leave to file the accompanying brief.

Respectfully submitted,

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BRIEF AMICI CURIAE OF BENJAMIN R.
CIVILETTI, NICHOLAS deB. KATZENBACH,
EDWARD H. LEVI, ELLIOT L. RICHARDSON,
et al. IN SUPPORT OF THE RESPONDENT

The individuals listed on the inside front page, as amici curiae, submit this brief, pursuant to Rule 37 of the Court's rules, to assist the Court in determining the appropriate standard of review on habeas corpus of a state court's applica-
tion of existing federal constitutional

law to specific facts. For the reasons stated herein, that review should continue to be de novo.

STATEMENT OF INTEREST OF AMICI CURIAE

This brief is filed on behalf of 66 individuals. They include former Attorneys General of the United States and of several states, former state and federal trial and appellate judges, former Governors, Senators and Representatives, and former prosecutors. They include practicing attorneys, law school deans and professors, and community leaders in other professions. They are men and women, Democrats and Republicans, supporters and opponents of the death penalty. Most importantly, they reflect an extraordinary depth and breadth of experience in every aspect of our criminal justice system. Despite the diversity of their backgrounds and their political perspectives, they are

united in their belief that the federal courts have, and should retain, plenary authority to determine whether a state prisoner's federal constitutional rights have been violated.

SUMMARY OF ARGUMENT

I. The revisions to the habeas corpus statute that Congress adopted in 1966 incorporated what by then was the well-entrenched rule of plenary habeas review. Having explicitly and with precision defined in those amendments certain limits to plenary federal court jurisdiction, Congress could not reasonably have meant, at the same time, to give the federal courts authority to declare additional and even more sweeping exceptions. The legislative history of the 1966 amendments, including Congress' intensive consideration, then rejection, of proposals to require habeas courts to defer to state

court determinations of federal constitutional law, confirms Congress' commitment to a rule of de novo review. The Court's adoption of a different rule here would seriously intrude on the constitutional role of Congress, particularly when the very issue before the Court is still being actively debated in Congress.

II. Because the Court has consistently adhered to a de novo review standard for nearly four decades, stare decisis also emphatically counsels against changing that rule now.

III. Even if "changed circumstances" somehow could empower the Court to substitute its policy choices for those made by Congress, circumstances have not changed. As in 1966, achievement of Congress' goals of remedying and deterring constitutional violations requires the enlistment of the lower federal judiciary in providing the

same independent review that the Court would, but in practice cannot, provide on direct review. Constitutional violations unremedied at the state court level continue at the same rate today as they did in 1966. The elimination of most federal habeas jurisdiction would substantially expand this Court's certiorari docket and increase pressure on this Court to grant certiorari in a far greater number of direct appeal cases. Moreover, a deference rule would not reduce the burden on lower federal judges or reduce conflict between federal and state judges.

ARGUMENT

I. The Habeas Statute Requires De Novo Federal Review of Questions of Constitutional Law.

Before the Court can decide whether a federal court should defer to a state court's application of the law to the

facts, it first must ask whether it can defer. Under any principled analysis of the federal habeas statute, the answer to that threshold question must be no. In 1966 Congress adopted the de novo review requirement as part of a comprehensive statutory scheme for federal habeas review. The Court is not now free to ignore Congress' deliberate policy choice.

A. In the 1966 Amendments, Congress Adopted the De Novo Review Formulation of Brown v. Allen.

Although the briefs in support of the Petitioners barely mention it, the question before this Court is a straightforward one of statutory construction: whether Congress intended the habeas statute, especially as amended in 1966, to provide for de novo federal court review of questions of constitutional law.

The rules of statutory construction applicable to this case are well-

established. First, the Court looks to the text of a statute to ascertain Congress' meaning and intent.¹ This "intrinsic" review considers both the literal words of the applicable sections and the provisions of the statute as a whole.² It is also presumed in that analysis that Congress knew how the courts, and especially this Court, interpreted prior law.³

¹ See, e.g., Norfolk and Western Ry. v. American Train Dispatchers Ass'n, 111 S. Ct. 1156, 1163 (1991) ("As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us.").

² See, e.g., King v. St. Vincent's Hosp., 112 S. Ct. 570, 574 (1991) ("we do nothing more, of course, than follow the cardinal rule that a statute is to be read as a whole, . . . since the meaning of statutory language, plain or not, depends on context") (citation omitted).

³ See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 699 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and it expected its enactment to be interpreted in conformity with them."). See also Miles v. Apex Marine Corp., 111 S. Ct. 317, 325 (1990); Thompson v. Thompson, 484 U.S. 174 (1988). ~

Finally, the Court may look to the "extrinsic" legislative history to resolve ambiguity or to see if it contains evidence sufficient to overcome the strong presumption in favor of the statutory text.⁴

When read in its entirety against the backdrop of this Court's interpretation of prior law, the federal habeas statute clearly reveals that Congress intended to include a de novo review standard when it amended the statute in 1966. When, in addition, the legislative history of the 1966 amendments is reviewed, any remaining doubt regarding Congress' intent is eliminated.

⁴ See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987).

1. **By 1966, This Court Had Unequivocally Interpreted the 1867 Habeas Statute to Require De Novo Review.**

The briefs filed in support of the Petitioners contend that this Court's decision in Brown v. Allen, 344 U.S. 443 (1953), was a radical departure from precedent.⁵ That, however, is not the issue here. The issue is what Congress understood existing law to be when it legislated in 1966.

On that issue, there can be no dispute. The Court in Brown unmistakably interpreted the habeas statute as conferring on the federal courts the obligation to review and decide questions of law de novo, including mixed questions of law and

⁵ E.g., Brief of Amicus Curiae Criminal Justice Legal Foundation in Support of Petitioner ("CJLF Br.") at 2-14.

fact.⁶ Moreover, Brown was not an isolated decision. By 1966, the de novo rule was firmly entrenched not only by Brown but by numerous additional cases in which the Court either explicitly or implicitly applied the de novo review standard.⁷

⁶ The "de novo review" rule is clearly stated in Justice Frankfurter's opinion. See 344 U.S. at 506. CJLF claims that Justice Frankfurter's opinion did not speak for the Court on this point and is inconsistent with Justice Reed's opinion. CJLF Br. at 14. No inconsistency exists. Justice Reed clearly stated that state court opinions deserve no more weight than other non-binding authority, 344 U.S. at 458, and he just as clearly made his own de novo examination of the legal issues in that very case. Id. at 466-87. Moreover, the Frankfurter opinion says that it is "designed to make explicit and detailed" the matters dealt with in the Reed opinion and that "[t]he views of the Court on these questions may thus be drawn from the two opinions jointly." Id. at 497. It is unrealistic for CJLF to think either that Justice Frankfurter misrepresented the significance of his opinion or that the other members of the Court would have ignored such a misrepresentation.

⁷ See, e.g., Townsend v. Sain, 372 U.S. 293, 318 (1963) ("Although the district [court] judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings (Footnote continued)

2. The Statutory Text Reveals an Intent to Require De Novo Federal Review.

In Brown, the Court relied primarily on the language of 28 U.S.C. § 2243 to hold that federal courts are required to determine independently whether the Constitution has been violated and, if so, to issue the writ.⁸ When Congress amended the statute in 1966, it did not change the

(Footnote 7 continued from previous page independently."). For applications of this standard between 1953 and 1966, see, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966); Pate v. Robinson, 383 U.S. 375 (1966); Boles v. Stevenson, 379 U.S. 43 (1964) (per curiam); Fay v. Noia, 372 U.S. 391 (1963); Gideon v. Wainright, 372 U.S. 335 (1963); Irvin v. Dowd, 366 U.S. 717, 723 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Douglas v. Green, 363 U.S. 192 (1960); United States ex rel. Jennings v. Ragen, 358 U.S. 276 (1959); Massey v. Moore, 348 U.S. 105 (1954); Leyra v. Denno, 347 U.S. 556 (1954); United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953).

⁸ See 344 U.S. at 460-61 (opinion of Reed, J.) ("The Code directs a court entertaining an application to award the writ," citing section 2243); id. at 505 (opinion of Frankfurter, J.) ("Section 2243 commands the judge 'entertaining' an application to award the writ or issue an order to show cause 'unless it appears from the application that the applicant . . . is not entitled thereto.'").

language of section 2243 or otherwise suggest that it disagreed with the Court's interpretation of that section.⁹ To the contrary, Congress added certain provisions to the statute that reveal Congress' intent to perpetuate the de novo review requirement by embedding it within the overall jurisdictional scheme. Those provisions deal directly and in a comprehensive way with the very subject at issue here -- the scope of federal court review of petitions filed by state prisoners. Together, they evidence a clear underlying premise that federal review of legal issues is plenary.

⁹ See Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

First, Congress added section 2254(d). That provision establishes a presumption of correctness for state court findings of fact that are not clearly erroneous and that are made after a "full, fair and adequate" hearing free of procedural irregularities. Glaringly absent from the 1966 amendments is any similar presumption of correctness for questions of law.

Congress also added section 2244(b), which deals with second or subsequent habeas petitions of state prisoners and gives preclusive effect (subject to exceptions not relevant here) to the prior decisions of a federal habeas court on questions of both fact and law. Also added was section 2244(c), which provides that decisions of this Court on the merits of state prisoners' claims "shall be conclusive as to all issues of fact or law"

and cannot be raised in any subsequent federal habeas petition, even a first one. The contrast between these two subsections and section 2254(d) is striking: When Congress intended to apply a less-than-de-novo standard of review to questions of law as well as fact, it made that intention explicit.

These three additions to the statute are all limitations on or exceptions to plenary federal court review. By enacting the exceptions, Congress also necessarily adopted the general rule to which the exceptions applied. Any other interpretation of the statute as it was amended in 1966 would lead to the improbable conclusion that, having explicitly and with precision defined certain limits to plenary federal court jurisdiction, Congress at the same time intended to let the federal

courts declare additional exceptions.¹⁰ It simply is not plausible that Congress, after carefully crafting the precise circumstances under which a federal court was to defer to state court factual findings, left entirely to the discretion of the courts a similar rule of deference for state court legal conclusions.¹¹

3. The Legislative History Leaves No Doubt That Congress Intended to Retain De Novo Review.

The legislative history of the 1966 amendments confirms that Congress meant to

¹⁰ Absent a result so "bizarre" or "absurd" that Congress "'could not have intended' it," the Court may not declare exceptions to the statutory mandate. Demarest v. Manspeaker, 111 S. Ct. 599, 604 (1991) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982)); see also United States v. Rutherford, 442 U.S. 544, 552 (1979).

¹¹ See Patsy v. Florida Bd. of Regents, 457 U.S. 496, 507-12 (1982) (when Congress adopted a specific exhaustion requirement for civil rights claims brought by institutionalized persons under 42 U.S.C. § 1983, it intended to leave standing the judicially-established rule that exhaustion is not required in such suits generally).

perpetuate the prevailing standard of de novo review. Between 1955 and 1966, fourteen bills were introduced in Congress to revise the habeas statute, several of which would have overruled the independent federal review principle of Brown v. Allen.¹² In the hearings, reports and debates on these bills, Congress thoroughly considered the very same objections to de novo review that the briefs in support of the Petitioners raise here.¹³ In the end, Congress rejected efforts to overrule Brown. Instead, it enacted a comprehen-

¹² The legislative history is replete with discussion of the Court's decision in Brown. See, e.g., 102 Cong. Rec. 936 (1956); Hearings Before Subcommittee No. 3, House Judiciary Comm., 84th Cong., 1st Sess. 2 (1955) (hereinafter Hearings I); H.R. Rep. No. 1200, 84th Cong., 1st Sess. 2, 7, 16, 19 (July 18, 1955); H.R. Rep. No. 293, 85th Cong., 2d Sess. 2, 16, 21 (Jan. 23, 1958).

¹³ See, e.g., Hearings I at 5-10, 17-18, 62, 95, 113-14; H.R. Rep. No. 1293, 85th Cong., 2d Sess. 2-3, 5-6 (1958); 104 Cong. Rec. 17336 (1958); 104 Cong. Rec. 19343 (1958).

sive jurisdictional scheme that not only adopted, but has as its foundation, plenary federal court review.

a. The Parker Proposal

Shortly after Brown was decided, the Judicial Conference of the United States proposed to Congress the so-called "Parker bill,"¹⁴ which was a frontal attack on Brown. The Parker bill would have prohibited habeas review in a lower federal court when issues of fact and law had been given (or could still be given) a "fair and adequate" hearing in the state courts.¹⁵

¹⁴ The proposal took its name from Chief Judge John J. Parker of the Fourth Circuit, Chair of the Judicial Conference's Special Committee on Habeas Corpus.

¹⁵ Under the Parker bill, a state prisoner could still have obtained de novo review of federal constitutional claims by filing an original application for a writ of habeas corpus in this Court. See 1963 Report of the Judicial Conference Committee on Habeas Corpus, 33 F.R.D. 363, 370 (1963); H.R. Rep. No. 548, 86th Cong., 1st Sess. 17 (1959).

The language used by the Judicial Conference in support of the Parker bill struck precisely the same themes that the briefs in support of the Petitioner urge on the Court here. The proponents of the bill thought that changes were needed so that "the principles of comity between State and Federal courts [could be] more effectively applied," and "a proper balance between the Federal and State courts restored."¹⁶ In particular, it was said repeatedly that the Parker bill would:

eliminate the delays and interference with the State criminal law and the consequent resentment on the part of judges of the several States which have arisen through the review by habeas corpus in the lower Federal courts of the judgments of the State courts.

¹⁶ H.R. Rep. No. 1293, 85th Cong., 2d Sess. 13 (1958); 102 Cong. Rec. 937 (1956) (statement of Representative Murray).

H.R. Rep. No. 1200, 84th Cong., 1st Sess. 5 (1955).¹⁷

The Parker proposal was first introduced in the House in 1955¹⁸ and was reintroduced at least six times thereafter. It passed the House in 1956 and again in 1958 with strong endorsements from the associations of state court chief justices and state attorneys general.¹⁹

When the legislation reached the Senate in 1958, however, opposition had begun to mount. In addition to fears that serious constitutional violations would go uncorrected, practical concerns were expressed. For example, members of this

¹⁷ See also sources cited supra note 12.

¹⁸ H.R. 5649, 84th Cong., 1st Sess. (1955).

¹⁹ 102 Cong. Rec. 936 (1956); 104 Cong. Rec. 4675 (1958); see Hearings I at 11, 27, 31, 54, 114-15, 117; H.R. Rep. No. 1200, 85th Cong., 1st Sess. 1 (1955).

Court warned that the burden on the Court to correct state court errors would be too great. See 33 F.R.D. at 371. The Justice Department, which originally endorsed the Parker bill, later opposed it because, among other things, it would impose on federal district judges the burden of reviewing an entirely new issue -- whether the "fair and adequate hearing" standard had been met in particular cases. See Justice Department Memorandum -- H.R. 8361: Federal Habeas Corpus for State Prisoners, reprinted in 104 Cong. Rec. 19342-44 (1958). Faced with such opposition, the Senate withheld action on the bill in 1958.

b. The 1959 Proposal

The Judicial Conference returned to Congress in 1959 with a radically changed proposal. The new Judicial Conference

bill, introduced as H.R. 6742, proposed amending Section 2254 to provide that only a specially convened three-judge federal district court could grant the habeas petition of a state prisoner. It also proposed adding what in essence are now subsections (b) and (c) of Section 2244.²⁰

Significantly, gone from the 1959 proposal was the Parker bill's wholesale overruling of Brown v. Allen. Except as modified by the proposed changes in Section 2244, H.R. 6742 left intact the notion that federal court review of state prisoner habeas petitions was plenary.

H.R. 6742 was endorsed by an array of legal organizations, as well as the Justice Department, and reported by a unanimous Judiciary Committee.²¹ Most of the

²⁰ See H.R. 6742, 86th Cong., 1st Sess. (1959).

²¹ H.R. Rep. No. 548, 86th Cong., 1st Sess. 1 (1959).

debate on the bill centered on its proposal for three-judge courts. Proponents and opponents alike, however, expressed an understanding that the bill gave those courts the same plenary habeas jurisdiction that single district judges had exercised at least since Brown.

For example, when asked whether the three-judge court provision would change the standard of review in habeas proceedings, Judge Orie Phillips, Chairman of the Judicial Conference's habeas committee, responded: "I do not think that changes present practice." Habeas Corpus: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary, 86th Cong., 1st Sess. 18 (1959). Chief Justice Weygandt of the Ohio Supreme Court, chairman of the Conference of Chief Justices, opposed the 1959 Judicial Conference proposal for that very reason:

The present complicated . . . bill accomplishes none of the objectives sought by the Conference of Chief Justices. In fact, it does the opposite in that it would afford permanent statutory approval of the misuse of the writ resulting from the decisions of the Federal Supreme Court.

105 Cong. Rec. 14636 (1959) (emphasis added). Objections like that of Judge Weygant were rejected, however, and the bill passed the House by unanimous consent. Id. at 14637. Again the Senate took no action.

c. The 1963 Proposal

In 1963, the Judicial Conference again proposed habeas reform legislation. It was persuaded to do so for two reasons. First, the Parker bill had been reintroduced, and the Judicial Conference was concerned that the bill would pass if no alternative was offered. See 33 F.R.D. at 377. Second, in March 1963 this Court handed down Gideon, Townsend and Fay v.

Noia, decisions that caused a significant increase in the number of habeas petitions filed in the federal courts and renewed calls for habeas reform. Id. The Judicial Conference feared that legislation would be proposed in reaction to Townsend that would make state court findings of fact conclusive, even when the proceedings in which such findings were made were not fair or adequate. Id. at 376, 378.

In response, the Judicial Conference again offered its 1959 proposal, but with a significant change. As a compromise on the Townsend issue, the bill added the "presumption of correctness" concept for factual findings that now is embodied in section 2254(d). Id. at 381. The House Judiciary Committee thereupon substituted the 1963 Judicial Conference proposal for the Parker bill, and the House passed the

measure in 1964.²² Once again, however, no action was taken in the Senate.

d. The 1966 Amendments

The 1963 Judicial Conference proposal was introduced again in 1965. Prior to action in the House, however, the Judicial Conference concluded that the three-judge court proposal "might lead to serious problems of administration."²³ The Judicial Conference accordingly returned full circle to review by a single district judge, as under existing law.

The 1965 Judicial Conference proposal was approved without significant change by the House and Senate Judiciary Committees

²² H.R. Rep. No. 1384, 88th Cong., 1st Sess. (1964); 110 Cong. Rec. 14684 (1964).

²³ 1965 Report of the Committee on Habeas Corpus of the Judicial Conference, reprinted in H.R. Rep. No. 1892, 89th Cong., 2d Sess. 13 (1966).

in 1966²⁴ and this time secured the approval of both houses.²⁵ It was signed into law by President Johnson on November 2, 1966. Pub. L. 89-711, 80 Stat. 1105.

The entire 13-year debate that resulted in the 1966 amendments was focused on precisely the question that the Court posed in its certiorari order: whether there should be limits on the plenary authority of lower federal habeas courts to overrule state court determinations of federal constitutional issues. After a circuitous journey involving serious consideration of proposals to strip federal habeas courts of their independent review

²⁴ H.R. Rep. No. 1892, 89th Cong., 2d Sess. (1966); S. Rep. No. 1797, 89th Cong., 2d Sess. (1966).

²⁵ 112 Cong. Rec. 21756 (1966) (House); *id.* at 27974 (1966) (Senate).

power, Congress ultimately came back to the de novo review standard. Whatever might be said of the wisdom of that choice, it cannot be denied that it was consciously and deliberately made.

It was neither necessary nor logical for Congress to restate the de novo review interpretation of Brown in order to incorporate it into the 1966 amendments. Congress made a thorough examination of the Court's interpretation of prior law and decided to leave it intact, save for three clearly defined exceptions. In these circumstances, no other conclusion can be drawn but that Congress specifically intended to perpetuate the de novo review standard in the statute.²⁶ See NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951)

²⁶ What the CJLF calls congressional "silence," CJLF Br. at 18, thus was in fact a conscious congressional decision to leave the established law alone.

(Congress is presumed to have adopted prior interpretations of law when they were "considered in great detail" during reenactment).²⁷

²⁷ The limitations the Court has applied to search and seizure, successive, procedurally defaulted, and new-law claims do not constitute judicial exceptions to the clear statutory scheme. In each of those areas, the Court either (1) carefully avoided impinging on the habeas statute, see Stone v. Powell, 428 U.S. 465, 495 n.37 (1976) ("Our decision today is not concerned with the scope of the habeas statute"), (2) applied an existing statutory restriction, see McCleskey v. Zant, 111 S. Ct. 1454, 1465 (1991) (applying 28 U.S.C. § 2244), or (3) effectuated Congress' mandate to give habeas petitioners the same level of review (but no more than) they would have received from the Court on direct appeal certiorari, see Wainwright v. Sykes, 433 U.S. 72, 78-79, (1977) (procedural default doctrine applies same restrictions on habeas as Court employs on direct review under "adequate and independent state ground" doctrine); Teague v. Lane, 489 U.S. 288, 295 (1989) (restricting habeas petitioners to "existing" law as of time when Court denied their direct appeal certiorari petitions). These cases have not undermined the rule that state court constitutional determinations are reviewed de novo on habeas and reversed whenever those determinations are found to be incorrect. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 314-15 (1989).

B. The Adoption of a Deference Rule by Judicial Fiat Would Seriously Intrude upon the Constitutional Prerogative of Congress.

Certainly Congress has the authority under the Constitution to make federal courts the ultimate arbiters of federal constitutional issues.²⁸ In 1966, after years of thorough consideration, it did exactly that.²⁹

Once Congress acted, this Court became obligated under our constitutional form of government to respect Congress' choice. The bedrock constitutional principle of separation of powers dictates that the Court's "individual appraisal of

²⁸ See U.S. Const. art. III, § 1.

²⁹ See Kuhlmann v. Wilson, 477 U.S. 436, 449 (1986) (plurality opinion) ("In 1966, Congress carefully reviewed the habeas corpus statutes and amended their provisions" with legislation that "weigh[ed] the interests of the individual prisoner against the sometimes contrary interest of the State").

the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute." TVA v. Hill, 437 U.S. 153, 194 (1978).

But even more is at issue here than respecting the policy choices made by Congress 25 years ago. Since then, Congress has repeatedly considered proposals for habeas "reform."³⁰ That debate reached a crescendo in the last session of the current Congress, when a "deference" standard much like that at issue here passed the Senate but could not garner a majority in the House.³¹

Having lost this latest round in Congress, the Petitioners and their sup-

³⁰ See Brief for Members of Congress in Support of Respondent at 9-16.

³¹ See CJLF Br. at 20.

porting amici seek to shift the debate to this Court. The Court's response should be that they are now in the wrong forum.

To begin with, the Petitioners premise their entire presentation on policy arguments -- arguments that the political branches are both constitutionally designated and better equipped to resolve. As Justice O'Connor has said in a similar context, "the matter is one of legislative choice based on difficult policy considerations Our decision today rightly leaves these issues to resolution by Congress and the state legislatures." Murray v. Giarratano, 492 U.S. 1, 13 (1989) (concurring opinion).

The legislative branch is likewise more capable than the Court of dealing comprehensively with these policy matters. For example, when Congress in the last session considered giving deference to

state courts on legal questions, it did so in the context of numerous proposals for habeas reform, including, most importantly, proposals to improve the quality of legal representation in state court proceedings. This Court, on the other hand, can deal only with the piece of the puzzle that is before it. As Justice Kennedy has said, "[j]udicial imposition of a categorical remedy . . . might pretermit other responsible solutions being considered in Congress and state legislatures Unlike Congress, this Court lacks the capacity to undertake the searching and comprehensive review called for in this area." Id. at 14 (concurring opinion).

Judicial restraint is important here, in addition, because the federal courts' jurisdiction to determine federal questions is a matter that the Constitution, in one of its drafters' most delicately

calibrated compromises, left explicitly to the political branches. See U.S. Const. art. III, § 1. Because the Constitution allocates responsibility to Congress to define the federal courts' jurisdiction, and because the question implicates the Court's self-interest, a scrupulous adherence to the jurisdiction that the political branches have designed is imperative.³²

Nor may it be presumed that Congress is any less sensitive to state interests than the Court is. After all, the constituency on whose behalf changes in existing habeas law are sought is especially well represented in Congress.³³ That

³² See Henry P. Monaghan, The Burger Court and "Our Federalism", 43 L. & Contemp. Prob. 39, 49 (1980).

³³ See Lawrence Gene Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 51 (1981) ("Congress retains a (Footnote continued)

these elected representatives have thus far decided against tipping the scales more in the states' favor should make the Court chary of doing so itself.

Finally, and most importantly, the court's own institutional integrity is at stake. Were it to adopt the suggested deference rule, it would be engaging in judicial activism in its rankest form, not only ignoring the existing statute but snatching from the legislative branch in mid-debate its prerogative to re-strike the delicate balance between federal and state interests. This Court's constitutional obligation is, instead, to let the elected representatives of the people make these difficult choices.³⁴

(Footnote 33 continued from previous page) deep sensitivity -- or as some would have it, a bias -- toward the interests of the states").

³⁴ See Bob Jones Univ. v. United States, 461 U.S. 574, 622 (1983) (Rehnquist, J., dissenting) ("this Court should not legislate for Congress"); see (Footnote continued)

II. Stare Decisis Also Prevents the Court from Abandoning De Novo Review.

Even if this were not a case in which Congress clearly and affirmatively adopted the de novo review standard, stare decisis would nevertheless dictate that the Court not reverse its own long-established precedent. "Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989).

(Footnote 34 continued from previous page) also ROBERT BORK, THE TEMPTING OF AMERICA, THE POLITICAL SEDUCTION OF THE LAW 141 (Touchstone ed. 1990) ("It is as important to freedom to confine the judiciary's power to its proper scope as it is to confine that of the President, Congress, or state and local governments. Indeed, it is probably more important, for only courts may not be called to account by the public.").

De novo review has been the unwavering rule of this Court for decades, both before and after the 1966 amendments. In Sumner v. Mata, 449 U.S. 539 (1981), the Court noted the extensive historical foundations of the rule:

It has long been established, as to those constitutional issues which may be raised under § 2254, that even a single federal judge may overturn the judgment of the highest court of a State insofar as it deals with the application of the United States Constitution or laws to the facts in question. As might be imagined, this result was not easily arrived at under the Habeas Corpus Act of 1867, the predecessor to 28 U.S.C. § 2254. But the present doctrine, adumbrated in the Court's opinion in Moore v. Dempsey, 261 U.S. 86 (1923), and culminating in this Court's opinion in Fay v. Noia, 372 U.S. 391 (1963), is that the Act of 1867 allows such collateral attack.

Id. at 543-44.³⁵ De novo review has con-

³⁵ See also Miller v. Fenton, 474 U.S. 104, 112 (1986) ("the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination"); Sumner v.
(Footnote continued)

sistently been the standard applied by the Court, even as recently as the current term. Estelle v. McGuire, 112 S. Ct. 475 (1991) (de novo review of whether admissibility of evidence or jury instruction violated due process).

In Miller v. Fenton, the Court emphasized the importance of adhering to stare decisis when it comes to modifying plenary federal habeas review:

We note at the outset that we do not write on a clean slate. "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions." Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970). Thus, even assuming that contemporary considerations supported respondent's construction of the statute, nearly half a century of unwavering precedent weighs heavily against any suggestion that we now disregard the settled rule in this area.

Id. at 115 (emphasis added).

(Footnote 35 continued from previous page)
Mata, 455 U.S. 591, 597 (1982) (per curiam); Rose v. Mitchell, 443 U.S. 545, 561 (1979).

The stare decisis considerations that dictated the result in Miller v. Fenton apply even more forcefully in this case, because here a long line of Court precedent is coupled with frequent congressional review of the very same subject. In commenting on "the presumption of stability in statutory interpretation," this Court has said:

We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention. If there is to be an overruling of the [Court's prior interpretation], it must come from Congress, rather than from this Court.

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986) (emphasis added).

This is, in short, a classic instance in which principled decision-making requires exercise of the judicial restraint inherent in stare decisis. If public respect for the law is to be fostered, a

change as profound as that contemplated here, in such a long and unwavering line of precedent, should be made, if at all, only by Congress.

III. The Policies That Prompted De Novo Review Remain Fully Valid Today.

The Petitioners and their amici do not even pretend to interpret the statute, though that is where analysis should begin and end. Even on their own "changed circumstances" ground, however, the Petitioners cannot prevail. The same four policy considerations that caused Congress to perpetuate de novo review in 1966 apply with equal force today. In addition, policies the Petitioners cite in support of a deference rule -- principally, the need for expeditious habeas procedures and to avoid conflict between federal and state courts -- in fact counsel against that rule.

A. The Remedial Function

A principal reason for de novo habeas review is the need to cure the significant number of serious constitutional violations that state courts fail to correct.³⁶

Proponents of a change in the de novo rule argue that state judges today are better educated and informed than they were 25 years ago. Such changes, however, have not in fact reduced the need for federal habeas review. The rate of habeas grants is as high today as it ever was, and is especially high in capital cases.

³⁶ See, e.g., Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990); Preiser v. Rodriguez, 411 U.S. 475, 497-98 (1973) ("Federal habeas corpus . . . serves the important function of . . . preserving for the state prisoner an expeditious federal forum for the vindication of his federally protected rights, if the State has denied redress."); H.R. Rep. No. 1892, 89th Cong., 2d Sess. 9 (1966) (1966 legislation "provides adequate remedies by habeas corpus to State prisoners and thereby safeguards the constitutional rights of such prisoners.).

In all federal habeas cases, relief is granted today in the same proportion (between 3 and 4 percent) as it was in 1966. Appendix A, Table I.³⁷ In capital cases since 1976 (when the death-penalty moratorium was lifted³⁸) the federal courts have found reversible constitutional error in 42 percent of all state judgments. Appendix B, Table I. Stated differently, since 1976, federal habeas review has prevented 149 prisoners from being executed on the basis of constitutionally flawed convictions or death sentences.³⁹ Id.

³⁷ This percentage is higher than it was at the time of Brown v. Allen, when only 1.8 percent of all applications were granted. See 344 U.S. at 498 (opinion of Frankfurter, J.) (in the seven prior years, federal courts granted 67 of 3,702 habeas applications).

³⁸ See Gregg v. Georgia, 428 U.S. 153 (1976).

³⁹ The rate of reversible constitutional error found on habeas review of state capital judgments has remained constant over the period -- 42 per-
(Footnote continued)

The difference between life and death in most of these cases was the availability of independent federal review of just the sort that a deference rule would preclude. Amici conducted a detailed study of the Georgia capital cases in which habeas relief was granted, singling out the ones in which a rule of deference would likely have forbidden relief -- i.e., cases in which the state courts (1) had the same law and facts before them as the federal courts, and (2) adjudicated the constitutional claim employing all due corrective procedures, without any indication of "bad faith" decision-making. The study reveals that a deference rule probably would have precluded relief in fully

(Footnote 39 continued from previous page)
cent between 1976 and 1984 and 41 percent between 1985 and 1991. The annual rate has never gone below 28 percent. Appendix B, Table II.

70 percent (32/46) of the cases in which the federal courts found reversible constitutional error. Appendix B, Table IV.

A few recent examples will suffice to show that egregious violations still routinely survive direct review and state post-conviction proceedings without correction:

In Pilchak v. Camper, 935 F.2d 145, 146-47 (8th Cir. 1991), the court granted relief because defense counsel, who was suffering from Alzheimer's disease, rendered ineffective assistance and because the investigating sheriff handpicked the jury venire. In Brown v. Lynaugh, 843 F.2d 849 (5th Cir. 1988), relief was granted because the presiding judge left the bench, took the witness stand and

provided the prosecution's principal evidence against the defendant.⁴⁰

In McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988), cert. denied, 489 U.S. 1033 (1989), the capital conviction of a dark-skinned black defendant was reversed because the prosecutor had withheld three eye-witness statements that the assailant was white. In Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991), a death sentence was reversed because the defense attorney conducted no investigation of mitigating circumstances and argued in summation that "the one you judge is . . .

⁴⁰ See also, e.g., Rivera v. Dept. of Corrections, 915 F.2d 280 (7th Cir. 1990) Henderson v. Lockhart, 864 F.2d 1447 (8th Cir. 1989) Burge v. Butler, 867 F.2d 247 (5th Cir. 1989); United States ex rel. Alerte v. Lane, 725 F. Supp. 936, 940 (N.D. Ill. 1989), appeal dismissed, 898 F.2d 69 (1990); Quartararo v. Fogg, 679 F. Supp. 212 (E.D.N.Y.), aff'd, 849 F.2d 1467 (2d Cir. 1988).

a worthless man. . . . [I] hate my client."⁴¹

⁴¹ Other egregious instances of prosecutorial misconduct in capital cases, including knowing presentation of false evidence and suppression of decisive exculpatory evidence, include, e.g., Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987), cert. denied, 488 U.S. 829 (1988); Bowen v. Maynard, 799 F.2d 593 (10th Cir.), cert. denied, 479 U.S. 962 (1986); Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986); Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985); Chaney v. Brown, 730 F.2d 1334 (10th Cir.), cert. denied, 469 U.S. 1090 (1984); Troedel v. Wainwright, 667 F. Supp. 1456 (S.D. Fla. 1986), aff'd, 828 F.2d 670 (11th Cir. 1987); Miller and Jent v. Wainwright, Nos. 86-98-Civ.-T-13 and 85-1910-Civ.-T-13 (M.D. Fla. Nov. 13, 1987) (unpublished decision on file with the United States District Court for the Middle District of Florida). Egregious capital cases involving ineffective assistance of counsel include, e.g., Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Loyd v. Smith, 899 F.2d 1416 (5th Cir. 1990); Chambers v. Armontrout, 885 F.2d 1318 (8th Cir. 1989), cert. denied, 111 S. Ct. 369 (1990); Harris v. Dugger, 874 F.2d 756, 763 (11th Cir.), cert. denied, 443 U.S. 1011 (1989); Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Jones v. Thigpen, 788 F.2d 1101 (5th Cir. 1986), cert. denied, 479 U.S. 1087 (1987); Ruffin v. Kemp, 767 F.2d 748 (11th Cir. 1985); Tyler v. Kemp, 755 F.2d 741 (11th Cir.), cert. denied, 474 U.S. 1026 (1985); House v. Balkcom, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870 (1984); Young v. Zant, 677 F.2d 792 (11th Cir. 1982), cert. denied, 464 U.S. 1057 (1984).

In none of these cases do the federal court decisions suggest that the state courts employed improper procedures or acted in bad faith in reaching the conclusion that no constitutional violations occurred. Under a deference standard, therefore, all of these egregious violations would have gone uncorrected.

B. The Deterrence Function

At the same time as it would leave serious constitutional errors uncorrected, a deference standard also would increase the number of cases in which such errors occur. For, by design, plenary federal habeas review deters constitutional violations from being committed or condoned by state courts.⁴²

⁴² See S. Rep. No. 1797, 89th Cong., 2d Sess. 3 (1966) ("the proposed legislation, if enacted, will be a strong inducement . . . to the state courts in criminal proceedings to safeguard the constitutional rights of defendants") (citation omitted); Butler v. McKellar, 110 S. Ct. 1212, (Footnote continued)

Confirming Congress' and the courts' longstanding faith in the deterrence value of independent federal review are the statements of state judges and law enforcement officials themselves. As one state supreme court justice testified in Congress last year, "the presence of potential federal review is a significant impetus for improving state . . . review processes."⁴³

(Footnote 42 continued from previous page) 1217 (1990) ("the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.") (quoting Teague v. Lane, 489 U.S. 288, 306 (1989), quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J. dissenting))).

⁴³ Prepared statement of Christine M. Durham, Justice, Utah Supreme Court, before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary on July 17, 1991, at 5 (on file with the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary). See also Robert Sheran, Chief Justice, Minnesota Supreme Court, State Courts and Federalism in the 1980s: Comment, 22 Wm. & Mary L. Rev. 789, 790 (1981) (increases in federal ha- (Footnote continued)

Data from amici's study of capital cases provide additional evidence that independent habeas review can have a dramatic deterrent effect. Between 1981 and 1986, the Fifth Circuit found reversible constitutional error in 80 percent of the Mississippi capital judgments it reviewed, compared to 22 percent, for example, of Louisiana capital judgments. Since 1986, however, the Fifth Circuit has found no constitutional error in its Mississippi cases. Appendix B, Table V. The data suggest an explanation. After some years of feedback from the federal courts about

(Footnote 43 continued from previous page) beas are "most frequently" prompted by the "failure or . . . refusal by state courts to fulfill the obligation . . . to enforce and respect federal law"); Letter from Judge Bruce R. Thompson to Senator Sam Ervin (Sept. 27, 1972) (discussed in Note, Proposed Modification of Federal Habeas Corpus for State Prisoners -- Reform or Revocation?, 61 Geo. L.J. 1221, 1251-52 & n.204 (1973)); Hon. Walter V. Schaefer, Federalism and State Criminal Procedure, 79 Harv. L. Rev. 1, 24 (1956).

the high level of error affecting Mississippi capital judgments, the Mississippi Supreme Court began giving more attention to direct appeal capital cases, doubling its reversal rate from 28 percent between 1978 and 1984 to 57 percent since then.⁴⁴ The decline in the federal courts' reversal rate in Mississippi cases followed directly.

C. The Independent Review Function

It has long been recognized that federal habeas review assures that a state prisoner's federal constitutional claims will be heard in a forum free of undue local influences that sometimes affect

⁴⁴ See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., STATE SUPREME COURT REVERSAL DATA 1976-1991 (unpublished data on file with NAACP Legal Defense and Educational Fund, Inc.). Analysis of the same federal and state data for Georgia reveals that the deterrence function of federal habeas is far from over. See infra at 57-58.

state judges.⁴⁵ Those same influences continue today to warrant independent federal habeas review.

⁴⁵ The importance of federal court determination of federal constitutional issues free of local influences on state judges has been recognized. See, e.g., 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124-25 (1911) (James Madison); The Federalist No. 81, at 522-23 (A. Hamilton) (Random House 1937); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 377, 386-87, 415-19 (1821); Cong. Globe, 42nd Cong., 1st Sess. 460 (1871) (Rep. Coburn) ("The United States courts are further above mere local influence than the county courts; their judges can act with more independence . . . ; their sympathies are not so nearly identified with those of the vicinage; . . . they will be able to rise above prejudices or bad passions . . . more easily We believe that we can trust our United States courts, and we propose to do so"); Henry P. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 272 (1985) (tracing Court's development since 1930s of independent review of "mixed" questions "to respond to the perceived dangers of distorted . . . law application in the state courts"). Congress evidenced the same recognition in adopting the 1966 habeas amendments. See H.R. Rep. No. 1384, 88th Cong., 2d Sess. 23-25 (1964) (Judicial Conference analysis criticizing proposals for deference to state court determinations as "wholly incompatible with the duty of Federal courts to determine Federal constitutional questions" and equating that duty with the Court's independent-review responsibility for "mixed" questions arising on direct appeal).

Nearly all state court judges who handle criminal cases continue to face periodic election.⁴⁶ State judges' case-loads remain comparatively high and their salaries comparatively low.⁴⁷ As Rosemary Barkett, a justice of the Florida Supreme Court, testified to Congress recently:

Tying the hands of the federal courts in these matters of life and death may serve the interests of finality of judgment, but it . . . ignores the realities of problems in the state courts where overburdened, elected judges are responsible for maintaining a system to satisfy the needs and immediate desires of the public. Federal judges are protected by life tenure, whereas state judges are

⁴⁶ See NATIONAL CENTER FOR STATE COURTS, STATE COURT ORGANIZATION at Tables 7, 20 (1987).

⁴⁷ See NATIONAL CENTER FOR STATE COURTS' COURT STATISTICS PROJECT, STATE CASELOAD STATISTICS: ANN. REP. 1989 at 17-21, 63-73, 99-107, 120-25 (1991) (state judges' average caseload is 3031 matters annually (356 criminal) compared to 512 matters (106 criminal) for federal judges); NATIONAL CENTER FOR STATE COURTS, 17 SURVEY OF JUDICIAL SALARIES, NO. 2 (1991) (federal trial and appellate judges earn about 50% more, on average, than state counterparts).

not.⁴⁸

D. The Delegation Function

As discussed above,⁴⁹ an important consideration in Congress' abandonment of the Parker bill was the need to enlist the aid of the entire federal judiciary in correcting constitutional errors that escape the state system and in deterring additional errors from occurring. Without full federal court participation, either

⁴⁸ Prepared Statement of Rosemary Barkett Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 1st Sess. 8-9 (May 22, 1991) (on file with the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary). See Prepared Statement of Justice Christine M. Durham, *supra*, note 43 at 3 (there is "a structural vulnerability in the state court systems to community and special interest pressures [that] are sometimes antithetical to federal constitutional guarantees") (emphasis in original); Statement of James L. Robertson, Justice, Mississippi Supreme Court, Hearings on S. 88, S. 1757, and S. 1760 before the Senate Judiciary Committee, 101st Cong., 1st and 2d Sess. 378 (1990).

⁴⁹ See *supra* at 39-49.

this Court would have to increase its workload enormously or large numbers of deserving cases would go unreviewed.⁵⁰

The same consideration applies today. If anything more than a lottery-type effort to correct erroneous state court constitutional rulings is to be made, then adoption of a deference rule would greatly increase pressure on the Court to hear cases on direct appeal -- pressure that

⁵⁰ See, e.g., Rose v. Mitchell, 443 U.S. 545, 561 (1979) ("There is a need . . . to ensure that an independent means of obtaining review by a federal court is available on a broader basis than review only by this Court will permit"); Darr v. Burford, 339 U.S. 200, 214-15 (1950); H.R. Rep. No. 1384, 88th Cong., 2d Sess. 17, 18, 23 (1964); S. Rep. No. 1797, 89th Cong., 2d Sess. 3 (1966). See also Paul J. Mishkin, Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 86-87 (1965) ("[E]ffective enforcement of federal guarantees directed at state criminal procedures can only be had through the availability of federal habeas corpus. . . . The sheer volume of the Court's work, not to mention inadequacy of some state procedures for presenting these questions, would preclude adequate vindication of these constitutional rights.").

Justice Kennedy recently suggested does not exist now because of de novo federal habeas review.⁵¹

Each year state prisoners file about 10,000 habeas petitions. Of those, about 400 (4 percent) are granted. In 1988 and 1989, about 180 (2 percent) of the 10,000 petitions filed resulted in published circuit court opinions on the merits in noncapital cases, in 38 of which the writ was granted. Careful analysis reveals, moreover, that in about 90 percent (34) of the published cases in which relief was granted, a deference rule would have required the lower federal courts to deny

⁵¹ See Spencer v. Georgia, 111 S. Ct. 2276 (1991) (Kennedy, J., concurring in the denial of certiorari) ("This case appears to present important questions of federal law, and if I thought our decision in Teague v. Lane . . . would prevent us from reaching those issues on federal habeas review, I would have voted to grant certiorari.").

relief.⁵² Appendix A, Table I; Appendix C, Table I.

These data offer considerable insight into the increased workload that a deference rule would thrust on the Court. The knowledge that no habeas relief would be available almost certainly would cause prisoners to file substantially more certiorari petitions than they do now following direct appeal and state post-conviction proceedings. Even if the Court somehow could limit certiorari grants to only those noncapital cases in which the lower federal courts now grant habeas relief, but in which a deference rule would in the future prohibit review, the Court still would have to increase its

⁵² These 34 decisions include only ones in which no federal hearing had to be held, no new law was applied, and no indication of improper state corrective processes was present.

merits docket by 360 noncapital cases a year (400 times 90 percent). Indeed, even if the Court could perfectly target its certiorari grants to only those cases that today warrant published court of appeals opinions granting relief, its merits docket still would increase by 34 new noncapital cases a year.

Added to these numbers would be capital cases. Between 1976 and 1991, the lower federal courts granted habeas writs in 149 capital cases. Extrapolating from data showing that about 70 percent of those grants involved the application of established law to known facts (see supra at 42) and assuming that the Court could limit its certiorari grants to cases in which relief was presumably warranted, the deference rule would have enlarged this Court's merits docket by over 100 capital cases since 1976. Sixty-five of those

cases would have been added during just the last five-and-a-half years.

Even these figures underestimate the burden a deference rule would place on the Court if deserving cases are not simply to be ignored. In exercising their existing de novo review function, the lower federal courts do much more than provide relief in particular cases. In addition, they are in a position to monitor the criminal justice systems in the states within their jurisdictions, spotting and giving special scrutiny to troublesome trends as they arise.

The data revealing the special attention the Fifth Circuit had to devote to capital cases arising from Mississippi already have been described. See supra at 47-49. The Eleventh Circuit continues to respond to an even more pervasive problem in its Georgia capital cases. Put blunt-

ly, the Eleventh Circuit's nearly 50 percent rate of reversing state capital judgments is the product not of an overzealous federal bench, but rather of almost habitual constitutional violations in a single state. Thus, although the Eleventh Circuit finds constitutional error in only 18 and 38 percent, respectively, of its Alabama and Florida cases, it has had to cure reversible constitutional violations in 66 percent (46/70) of its Georgia capital cases.⁵³ Appendix B, Table III and V.

This Court does not have the capacity to discover and cure pervasive problems of

⁵³ In contrast, the Georgia Supreme Court reverses capital convictions or sentences only 26 percent of the time -- the lowest state-court reversal rate in the Eleventh Circuit and one of the lowest rates in the country (nationally, the state-court reversal rate in capital cases is 46 percent). See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., STATE SUPREME COURT REVERSAL DATA 1976-1991, supra note 44.

this sort.⁵⁴ As Judge Posner's Subcommittee on the Role of the Federal Courts and Their Relation to the States found recently, however, the burden of habeas is manageable when spread among the entire lower federal judiciary and accordingly does not warrant a deference rule.⁵⁵

The reality, of course, is that, if a deference rule were adopted, this Court could not even begin to perform on direct

⁵⁴ A study of the Fifth, Sixth and Seventh Circuits reveals even larger state-by-state disparities within circuits in the rate of habeas grants in noncapital cases. Appendix C, Table 2.

⁵⁵ See Report of the Subcommittee on the Role of the Federal Courts and Their Relation to the States, in 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 468-515 (July 1, 1990). District and circuit judges' easy access to region-specific information that is not so readily available to this Court has long been cited as one justification of habeas' enlistment of the lower federal judiciary in the independent-review function in state criminal cases. See Brown v. Allen, 344 U.S. at 458 (opinion of Reed, J.); Darr v. Burford, 339 U.S. 200, 229-31 (1950) (Frankfurter, J., dissenting).

review the functions that lower federal courts currently discharge on habeas. As a result, a rule of deference would deprive hundreds of men and women who are convicted each year in violation of the federal Constitution -- and many more who are unconstitutionally sentenced to death -- of any meaningful review and redress in any federal court. Policy aside, that outcome directly contradicts the intent of Congress in adopting the 1966 amendments. All parties to the debates leading up to the amendments agreed that independent review and redress for constitutional violations had to be available in some federal court. Even the Parker bill so provided. See supra note 15. This Court's caseload, even at that time, ultimately persuaded Congress that the lower federal courts of necessity had to be

utilized if meaningful review was to be provided.

E. Efficiency and Comity

Although the Petitioners promote the rule of deference on efficiency and comity grounds, those very policies counsel against that rule. To begin with, a deference rule would cause precisely the "proliferation of substantial interpretive litigation" that led the Judicial Conference and the Justice Department in the past to warn Congress against similar habeas reforms.⁵⁶ Prisoners as a matter of course would allege that the state court corrective process employed in their cases was unfair, unreasonable or suffused

⁵⁶ Reports of the Judicial Conference of the United States -- Report of the Administrative Office, U.S. Courts, 1973 at 74 (U.S. Gov't Printing Office 1974). See also Department of Justice Memorandum -- H.R. 8361: Federal Habeas Corpus for State Prisoners, reprinted in 104 Cong. Rec. 19342 (Aug. 23, 1958).

with the "bad faith" of state court judges. Accordingly, judicial scrutiny of a new, fact-intensive issue would be required in virtually every case.

Equally important, as your amici who have served as state judges can attest, the prospect of having every petition and every published habeas corpus decision turn, not on whether the state court "got the law right," but rather on whether the court acted "unreasonably" or in "bad faith," would increase the friction between state and federal judges.⁵⁷ There

⁵⁷ The Teague analogy does not serve the Petitioners. Asking, as does Teague, whether state judges reasonably predicted the future direction of Supreme Court doctrine is a far less derogatory inquiry than asking whether, in mistakenly denying relief on the basis of existing law, a state judge was motivated by antipathy to the Constitution, bias against the defendant, political considerations, or simply egregiously poor judgment. Moreover, Teague's "reasonableness" test has proved difficult to apply. Reaching conflicting conclusions on the same facts are, e.g., Zettlemoyer v. Fulcomer, 923 F.2d 284, 306 n.19 (3d Cir.), cert. denied, 111 S. Ct. 2840 (1991), and

(Footnote continued)

is no sense, therefore, to the claim that time, resources and dignity could somehow be saved by replacing the time-honored and well understood distinction between law and fact with an untried and potentially insulting standard focused on the bonafides of state judges.⁵⁸

Accordingly, even if the existing system were "broken," and even if the Court were the proper authority to fix it, a deference rule would create as many

(Footnote 57 continued from previous page)
McDougall v. Dixon, 921 F.2d 518, 539 (4th Cir. 1990); Graham v. Hoke, 946 F.2d 982, 992-94 (2d Cir. 1991), cert. denied, 112 S. Ct. 890 (1992), and Hanrahan v. Greer, 896 F.2d 241, 245 (7th Cir. 1990); Cain v. Redman, 947 F.2d 817, 821-22 (6th Cir. 1991), and Acosta v. Makowski, 756 F. Supp. 1018, 1021 (E.D. Mich. 1991).

⁵⁸ See Monaghan, supra note 45, at 234-35 ("the categories of law and fact have traditionally served an important regulatory function in distributing authority among various decisionmakers in the legal system" and find expression in Article III and the Seventh Amendment to the Constitution).

efficiency and comity problems as it supposedly addresses.

IV. Conclusion

For the reasons stated herein, the Court should decline to adopt a rule that federal habeas courts give deference to state court conclusions of law on federal constitutional claims. Instead, the Court should continue to enforce the time-honored and congressionally adopted standard of de novo review.

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APPENDIX

APPENDIX A
HABEAS "GRANT" RATES, ALL CASES

**TABLE I: RATE OF RELIEF GRANTED
IN STATE-PRISONER HABEAS PETITIONS
1963-1981¹**

<u>Year</u>	<u>Jurisdiction</u>	<u>%Granted</u>
1963	All	2.5
1964	All	3.9
1965	All	3.7
1970	All	4.0
1970	Massachusetts	4.0
1971	Massachusetts	1.0
1972	Massachusetts	4.0
1973-75	SDNY	3.0
1975-77	CA7, CDCA, SDCA, NDIl., DNJ, EDVa.	3.2
1979-81	SDNY	4.0

¹ SOURCES: S. Rep. No. 1797, 89th Cong., 2d Sess. 4-5 (1966) (mid-1960s data); Wright & Sofaer, Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility, 75 Yale L.J. 895 (1966) (1963, 1964, 1965 data); Ann. Report of the Administrative Office of the United States Courts 132 (1971) (1970 data); Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 333 (1973) (Massachusetts data, 1970-72); U.S. Department of Justice, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 5, 51, table 19 (1979) (1975-77 data); Faust, Rubenstein & Yackle, The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate, 18 N.Y.U. J.L. & Soc. Change 637, 681 (1990-91) (1973-75 and 1979-81 data).

**APPENDIX B
HABEAS "GRANT" RATES, CAPITAL CASES**

**TABLE I:
RATE OF REVERSIBLE CONSTITUTIONAL ERROR
FOUND UPON FINAL HABEAS REVIEW
OF STATE CAPITAL JUDGMENTS
1976-1991¹**

<u>Period</u>	<u>Judgments Reviewed</u>	<u>Const'l Violations Found</u>	<u>Violation Rate</u>
7/1/76- 5/31/91	149	357	42% ²

¹ Published federal decisions document the final outcomes of capitally sentenced petitioners' habeas corpus challenges to 357 state-court capital judgments between July 1, 1976 and May 31, 1991. (Table VI *infra* lists the decisions.) A "final outcome" is the result after all legally permissible federal habeas challenges to a state judgment have been finally resolved on the merits by the federal courts. Using sources other than published federal opinions, 47 additional outcomes were documented -- 42 grants of habeas relief and 5 denials, for a documented total of 191 reversible constitutional violations affecting 404 judgments (47% violation rate). See Appendix to Statement of John J. Cutin, Jr. before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, July 17, 1991 (preliminary analysis of same data, including unpublished decisions).

² Constitutional violations were found in 147 first-petition cases and 2 successive-petition cases.

**TABLE II
ANNUAL CONSTITUTIONAL-VIOLATION RATES
IN FIRST-PETITION CAPITAL HABEAS CASES
JULY 1976-MAY 1991**

1978	50%	(1/2)	1985	41%	(15/37)
1979	--	(0/0)	1986	43%	(19/44)
1980	75%	(3/4)	1987	50%	(18/36)
1981	67%	(6/9)	1988	42%	(22/52)
1982	80%	(12/15)	1989	28%	(10/36)
1983	29%	(9/31)	1990	28%	(9/32)
1984	29%	(11/38)	1991	53%	(12/21)
'78-84	42%	(42/99)	'85-91	41%	(105/258)

TOTAL '78-91 41% (147/357)

**TABLE III
CONSTITUTIONAL-VIOLATION RATES
IN FIRST-PETITION CAPITAL HABEAS CASES
BY CIRCUIT JULY 1976-MAY 1991³**

3rd	50%	(1/2)	8th	46%	(13/28)
4th	13%	(4/30)	9th	69%	(9/13)
5th	30%	(36/121)	10th	60%	(6/10)
6th	100%	(1/1)	11th	49%	(72/146)
7th	83%	(5/6)	All	41%	(147/357)

³ Fifth Circuit data include cases adjudicated by both the old Fifth Circuit (AL, FL, GA, LA, MS, TX) and the new Fifth Circuit (LA, MS, TX).

TABLE IV

**BASES FOR CONSTITUTIONAL RELIEF:
HABEAS GRANTS IN GEORGIA CASES
JULY 1976-MAY 1991**

<u>Type of violation</u>	Cases	
	Involving Est'd Fact/Law	All Cases
Improper b/prf instr.	10 (26%)	10 (19%)
Jury composition	6 (15%)	7 (13%)
Prosec. misconduct	6 (15%)	6 (11%)
Other improper instr.	5 (13%)	5 (9%)
Ineffective assist.	4 (10%)	13 (25%)
Prejudicial public'y	1 (3%)	4 (8%)
Incompet. to std tr.	1 (3%)	2 (4%)
Involun. confession	1 (3%)	1 (2%)
Requested attny den'd	1 (0%)	1 (2%)
<u>Miranda</u>	1 (3%)	1 (2%)
<u>Estelle v. Smith</u>	1 (3%)	1 (2%)
Denial confrontation	1 (3%)	1 (2%)
Mitig'g ev. excluded	1 (3%)	1 (2%)
TOTAL	39	53

Explanation: The federal opinions in which the 46 state capital judgments originating in Georgia were finally reviewed by federal habeas courts between 1976 and 1991 and found to be flawed by reversible constitutional error were analyzed to see how many of the violation findings turned on the federal courts' application of the same law and facts as the state courts applied when they upheld the judgment. By excluding cases in which

federal hearings were held and "new law" applied, 32 such cases were identified.⁴ The federal decisions in those cases were reviewed to determine how many included language or findings indicative of bad faith or unreasonable judging by the state courts that previously had rejected the claims. No such decisions were found. Table IV above lists the constitutional claims on which relief was granted in (1) the 32 cases involving the federal courts' application of the same law and facts as the state courts applied, and (2) in all 46 cases. Total claims exceed the total number of cases because federal relief was granted on multiple grounds in several cases.

⁴ The petitioners in the 32 cases are: Alderman, Berryhill-A, Berryhill-B, Bowen, Brooks, Buttrum, Cervi, Corn, Cunningham, Davis, Dick, Dix, Drake, Fair, Finney, Franklin, Gibson, Godfrey, Goodwin, Hance, Machetti, Mason, Moore, Morgan, Potts-A, Potts-B, Ruffin, Strickland, Thomas (Joseph), Wallace, Wilson, Young.

TABLE V

**ANNUAL CONSTITUTIONAL-VIOLATION RATES
IN FIRST-PETITION CAPITAL HABEAS CASES
BY STATES -- 5TH, 11TH CIRCUITS
JULY 1976-MAY 1991**

Fifth Circuit⁵

Year	Grants/ Petrn (%)	Grants/ Petrn (%)	Grants/ Petrn (%)
	LOUISIANA	MISSISSIP.	TEXAS
80	0/0 --	0/0 --	2/2 (100)
81	0/1 (0)	1/1 (100)	3/3 (100)
82	1/2 (50)	2/3 (67)	3/4 (75)
83	0/2 (0)	0/0 --	2/8 (25)
84	1/7 (14)	0/0 --	1/3 (33)
85	1/5 (20)	0/0 --	2/3 (67)
86	2/6 (33)	5/6 (83)	0/8 (0)
87	0/2 (0)	0/1 (0)	0/5 (0)
88	0/4 (0)	0/2 (0)	1/1 (9)
89	1/2 (50)	0/0 (0)	1/1 (10)
90	0/1 (0)	0/2 (0)	1/4 (25)
91	0/0 --	0/0 --	1/1 (100)
TOT.	6/32 (19)	8/15 (53)	17/62 (27)

⁵ Table excludes cases adjudicated by the old Fifth Circuit that arose in States now included in the Eleventh Circuit.

Eleventh Circuit⁶

Year	Grants/ Petrn (%)	Grants/ Petrn (%)	Grants/ Petrn (%)
	ALABAMA	FLORIDA	GEORGIA
78	0/0 --	0/1 (0)	0/0 --
80	0/1 (0)	1/1 (100)	0/0 --
81	0/0 --	0/1 (0)	2/3 (67)
82	0/0 --	1/1 (100)	5/5 (100)
83	0/0 --	0/8 (0)	5/9 (56)
84	0/0 --	2/9 (22)	5/12 (42)
85	0/1 (0)	0/9 (0)	11/15 (73)
86	1/1 (100)	2/6 (33)	3/6 (50)
87	0/2 (0)	8/12 (67)	6/7 (86)
88	0/3 (0)	7/9 (78)	6/8 (75)
89	0/2 (0)	2/8 (25)	1/2 (50)
90	0/0 --	1/2 (50)	1/2 (50)
91	1/1 (100)	5/10 (50)	1/1 (100)
TOT.	2/11 (18)	29/77 (38)	46/70 (66)

⁶ Table includes cases adjudicated by the old Fifth Circuit before it was split into the Fifth and Eleventh Circuits.

TABLE VI

STATE CAPITAL JUDGMENTS FINALLY REVIEWED
ON HABEAS CORPUS, JULY 1976-MAY 1991⁷

Name	State	ANTONE	FL
Yr P R Ct Vol Rptr Page		83 1 - 11 706 F.2d 1534	
ADAMS, A.	FL	ARMSTRONG	FL
85 1 - 11 764 F.2d 1356		87 1 + 11 833 F.2d 1430	
ADAMS, J.	FL	AUTRY	TX
83 1 - 11 709 F.2d 1443		83 1 - 05 706 F.2d 1394	
ADAMSON	AZ	BALDWIN	LA
88 1 + 09 865 F.2d 1011		81 1 - 05 653 F.2d 0942	
ALDERMAN	GA	BAREFOOT	TX
81 1 + 05 663 F.2d 0558		83 1 - 05 463 U.S. 0880	
ALDRICH	FL	BARFIELD	NC
85 1 - 11 777 F.2d 0630		83 1 - 04 719 F.2d 0058	
ALDRIDGE	FL	BASS	TX
91 1 + 11 925 F.2d 1320		83 1 - 05 696 F.2d 1154	
ALVORD	FL	BASSETTE	VA
84 1 - 11 725 F.2d 1282		90 1 - 04 915 F.2d 0932	
AMADEO	GA	BATTIE	TX
88 1 + 11 486 U.S. 0214		81 1 + 05 655 F.2d 0692	
ANDRADE	TX	BELL	MS
86 1 - 05 805 F.2d 1190		82 1 + 05 692 F.2d 0999	

⁷ In addition to the name of the petitioner whose capital judgment was reviewed, the table includes the year of the decision (Yr); the number of each petition filed (P); the result (R) ("+" indicates that a reversible constitutional violation was found; "-" indicates that no violation was found); the convicting State; and the citation of the decision finally adjudicating petitioners' initial habeas petitions and of the two decisions granting relief on successive petitions. Citations followed by an asterisk refer to published decisions documenting previously unpublished outcomes.

BELL-A	TX	BROCK	TX
84 1 + 05 828 F.2d 1088*		86 1 - 05 781 F.2d 1152	
BELL-B	TX	BROGDON	LA
87 1 - 05 828 F.2d 1085		86 1 - 05 790 F.2d 1164	
BERRY	LA	BROOKS, C.	TX
85 1 - 05 765 F.2d 0451		82 1 - 05 702 F.2d 0084	
BERRYHILL-A	GA	BROOKS, W.	GA
81 1 + 05 640 F.2d 0382		87 1 + 11 809 F.2d 0700	
BERRYHILL-B	GA	BROWN, D.	NC
88 1 + 11 858 F.2d 0633		89 1 - 04 891 F.2d 0490	
BERTOLOTTI	FL	BROWN, J.	FL
89 1 - 11 883 F.2d 1503		86 1 + 11 785 F.2d 1457	
BLAIR	MO	BUFORD	FL
90 1 - 08 916 F.2d 1310		88 1 + 11 841 F.2d 1057	
BLAKE	GA	BULLOCK	MS
85 1 + 11 758 F.2d 0523		86 1 + 05 784 F.2d 0187	
BOGGS	VA	BUNDY	FL
84 1 - 04 892 F.2d 1193		88 1 - 11 850 F.2d 1402	
BOLDER	MO	BURGER	GA
90 1 - 08 921 F.2d 1359		86 1 - 11 785 F.2d 0890	
BOOKER	FL	BURNS	TX
81 1 - 05 703 F.2d 1251		80 1 + 05 626 F.2d 0396	
91 3 + 11 922 F.2d 0633		BUTLER	SC
BOWEN	GA	90 1 - 04 110 S.Ct 1212	
84 1 - 11 767 F.2d 0761		BUTTRUM	GA
BOWEN, Charles	GA	90 1 + 11 908 F.2d 0695	
87 1 + 11 832 F.2d 0546		BUXTON	TX
BOWEN, Clifford	OK	89 1 - 05 879 F.2d 0140	
86 1 + 10 799 F.2d 0593		BYRNE	LA
BREWER	IN	88 1 - 05 847 F.2d 1130	
90 1 + 07 917 F.2d 1306		CAMPBELL	WA
BRIDGE	TX	87 1 - 09 829 F.2d 1453	
88 1 - 05 860 F.2d 0162		CAPE	GA
BRILEY, J.	VA	84 1 - 11 741 F.2d 1287	
85 1 - 04 750 F.2d 1238		CARTWRIGHT	OK
BRILEY, L.	VA	88 1 + 10 486 U.S. 0356	
84 1 - 04 742 F.2d 0155			

CELESTINE LA
84 1 - 05 750 F.2d 0353

CERVI GA
88 1 + 11 855 F.2d 0702

CHAMBERS MO
90 1 + 08 907 F.2d 0825

CHANEY OK
84 1 + 10 730 F.2d 1334

CHRISTOPHER FL
87 1 + 11 824 F.2d 0836

CLANTON VA
87 1 - 04 826 F.2d 1354

CLARK, C. LA
82 1 + 05 694 F.2d 0075

CLARK, R. FL
87 1 - 11 834 F.2d 1561

CLOZZA VA
90 1 - 04 913 F.2d 1092

COLEMAN, C. OK
86 1 - 10 802 F.2d 1227

COLEMAN, D. MT
89 1 + 09 874 F.2d 1280

COLEMAN, W. GA
85 1 + 11 778 F.2d 1487

COLLINS, C. AR
85 1 + 08 754 F.2d 0258

COLLINS, R. GA
84 1 - 11 728 F.2d 1322

CORDOVA TX
88 1 + 05 838 F.2d 0764

CORN GA
88 1 + 11 837 F.2d 1474

CREECH ID
91 1 + 09 928 F.2d 1481

CUEVAS TX
90 1 - 05 922 F.2d 0242

CUNNINGHAM GA
91 1 + 11 928 F.2d 1006

DARDEN FL
83 1 - 11 767 F.2d 0752

DAVIS, CHARLES OK
90 1 + 10 911 F.2d 0415

DAVIS, CURFEW GA
85 1 + 11 752 F.2d 1515

DAVIS, F. FL
87 1 - 11 829 F.2d 1522

DE LA ROSA TX
84 1 - 05 743 F.2d 0299

DELAP FL
89 1 + 11 890 F.2d 0285

DELUNA TX
89 1 - 05 873 F.2d 0757

DEMPS FL
86 1 - 11 805 F.2d 1426

DENTON-A AR
86 1 + 08 806 F.2d 0158

DICK GA
87 1 + 11 833 F.2d 1448

DILLON IN
84 1 + 07 751 F.2d 0895

DIX GA
87 1 + 11 832 F.2d 0546

DOBBERT
83 1 - 11 718 F.2d 1518

DOUGLAS FL
84 1 + 11 739 F.2d 0531

DOYLE FL
91 1 - 11 922 F.2d 0646

DRAKE GA
85 1 + 11 762 F.2d 1449

DUNGEE GA
85 1 + 11 778 F.2d 1482

DUNKINS AL
88 1 - 11 854 F.2d 0394

DUTTON OK
87 1 + 10 812 F.2d 0593

EARVIN TX
88 1 - 05 860 F.2d 0623

EDWARDS MS
88 1 - 05 849 F.2d 0204

ELLEDGE FL
87 1 + 11 823 F.2d 1439

ELLIS TX
89 1 - 05 873 F.2d 0830

ESQUIVEL TX
85 1 - 05 777 F.2d 0956

EVANS, C. MS
87 1 - 05 809 F.2d 0239

EVANS, J. AL
80 1 - 05 628 F.2d 0400

EVANS, L. AZ
88 1 + 09 855 F.2d 0631

EVANS, M. TX
86 1 - 05 790 F.2d 1232

EVANS, W. VA
89 1 - 04 881 F.2d 0117

FAIR GA
83 1 + 11 715 F.2d 1519

FELDE LA
87 1 - 05 817 F.2d 0281

FELDER TX
85 1 + 05 765 F.2d 1245

FIERRO TX
89 1 - 05 879 F.2d 1276

FINNEY GA
83 1 + 11 709 F.2d 0643

FITZPATRICK MT
89 1 + 09 869 F.2d 1247

FLEMMING GA
84 1 - 11 748 F.2d 1435

FLOWERS LA
86 1 + 05 779 F.2d 1115

FOSTER FL
83 1 - 11 707 F.2d 1337

FRANCIS FL
90 1 - 11 908 F.2d 0696

FRANCOIS FL
84 1 - 11 741 F.2d 1275

FRANKLIN, D. TX
88 1 - 05 487 U.S. 0164

FRANKLIN, R. GA
85 1 + 11 471 U.S. 0307

FUNCHESS FL
85 1 - 11 772 F.2d 0683

GAINES IL
88 1 + 07 846 F.2d 0402

GARRETT TX
88 1 - 05 842 F.2d 0113

GASKINS SC
90 1 - 04 916 F.2d 0941

GATES GA
89 1 - 11 863 F.2d 1492

GHOLSON TX
82 1 + 05 675 F.2d 0734

GIARRATANO VA
89 1 - 04 891 F.2d 0483

GIBSON GA
83 1 + 11 705 F.2d 1543

GILLIARD MS
88 1 - 05 847 F.2d 1141

GILMORE MO
88 1 - 08 861 F.2d 1061

GLASS LA
86 1 - 05 791 F.2d 1165

GODFREY GA
88 1 + 11 836 F.2d 1557

GOODE FL
84 1 - 11 725 F.2d 0106

GOODWIN GA
82 1 + 11 684 F.2d 0794

GORE FL
91 1 + 11 933 F.2d 0904

GRANVIEL-A TX
81 1 + 05 655 F.2d 0673

GRANVIEL-B TX
89 1 - 05 881 F.2d 0185

GRAY MS
82 1 - 05 677 F.2d 1086

GREEN, RANDY TX
83 1 + 05 706 F.2d 0148

GREEN, ROOSEVELT GA
84 1 - 11 738 F.2d 1529

GRIFFIN, J. TX
87 1 - 05 823 F.2d 0856

GRIFFIN, K. FL
89 1 - 11 874 F.2d 1397

GUINAN MO
90 1 - 08 909 F.2d 1224

HALL FL
86 1 - 11 805 F.2d 0945

HAMBLIN FL
89 1 - 11 492 U.S. 0929

HANCE GA
83 1 + 11 696 F.2d 0940

HARDING AZ
87 1 - 09 834 F.2d 0853

HARGRAVE FL
87 1 + 11 832 F.2d 1528

HARICH FL
88 1 - 11 844 F.2d 1464

HARPER NE
90 1 - 08 895 F.2d 0473

HARRIS FL
89 1 + 11 874 F.2d 0756

HAWKINS TX
88 1 - 05 844 F.2d 1132

HAYES AR
89 1 + 08 881 F.2d 1451

HENDERSON, R. FL
91 1 - 11 925 F.2d 1309

HENDERSON, W. AR
91 1 + 08 926 F.2d 0706

HENRY FL
83 1 - 05 721 F.2d 0990

HERRERA TX
90 1 - 05 904 F.2d 0944

HIGH GA
90 1 - 11 916 F.2d 1507

HILL, A. MS
90 1 - 05 920 F.2d 0249

HILL, S. AR
91 1 - 08 927 F.2d 0340

HITCHCOCK FL
87 1 + 11 832 F.2d 0140

HOLTAN-A NE
83 1 + 08 683 F.2d 1163

HOLTAN-B NE
88 1 + 08 838 F.2d 0984

HOPKINSON WY
89 1 - 10 888 F.2d 1286

HOUSE GA
84 1 + 11 725 F.2d 0608

HUTCHINS NC
83 1 - 04 724 F.2d 1425

HYMAN SC
87 1 + 04 824 F.2d 1405

ISAACS GA
85 1 + 11 778 F.2d 1482

JACKSON, C. FL
91 1 + 11 931 F.2d 0712

JACKSON, R. FL
88 1 + 11 837 F.2d 1469

JAMES LA
87 1 - 05 827 F.2d 1006

JOHNSON, EDWARD MS
86 1 - 05 806 F.2d 1243

JOHNSON, ELLIOTT TX
86 1 - 05 804 F.2d 0300

JOHNSON, J. GA
86 1 + 11 781 F.2d 1482

JOHNSON, L. FL
85 1 - 11 778 F.2d 0623

JONES, ANDREW LA
88 1 - 05 864 F.2d 0348

JONES, ARTHUR AL
85 1 - 11 772 F.2d 0668

JONES, LARRY MS
86 1 + 05 788 F.2d 1101

JONES, LEO FL
91 1 - 11 928 F.2d 1020

JONES, R. MS
82 1 + 05 681 F.2d 1067

JULIUS AL
88 1 - 11 840 F.2d 1533

JUREK TX
80 1 + 05 623 F.2d 0929

JUSTUS VA
90 1 - 04 897 F.2d 0709

KELLY TX
88 1 - 05 862 F.2d 1126

KENLEY MO
91 1 + 08 937 F.2d 1298

KENNEDY FL
91 1 - 11 933 F.2d 0905

KING, A. FL
84 1 + 11 748 F.2d 1462

KING, L. TX
88 1 - 05 850 F.2d 1055

KIRKPATRICK LA
89 1 - 05 870 F.2d 0276

KNIGHT FL
88 1 + 11 863 F.2d 0705

KNIGHTON LA
84 1 - 05 740 F.2d 1344

KNOX TX
91 1 + 05 928 F.2d 0657

KORDENBROCK KY
90 1 + 06 919 F.2d 1091

KUBAT IL
89 1 + 07 867 F.2d 0351

LANDRY TX
88 1 - 05 844 F.2d 1117

LAWS MO
88 1 - 08 863 F.2d 1377

LESKO PA
91 1 + 03 925 F.2d 1527

LEWIS IL
87 1 + 07 832 F.2d 1446

LIGHTBORNE FL
87 1 - 11 829 F.2d 1012

LINDSEY, M. AL
87 1 - 11 820 F.2d 1137

LINDSEY, T. LA
85 1 + 05 769 F.2d 1034

LOWENFIELD LA
88 1 - 05 484 U.S. 0231

MACHETTI GA
82 1 + 11 679 F.2d 0236

MAGILL FL
87 1 + 11 824 F.2d 0879

MAGWOOD AL
86 1 + 11 791 F.2d 1438

MANN, F. TX
88 1 - 05 840 F.2d 1194

MANN, L. FL
88 1 + 11 844 F.2d 1446

MARTIN, D. LA
83 1 - 05 711 F.2d 1273

MARTIN, N. FL
85 1 - 11 770 F.2d 0918

MASON, G. GA
82 1 + 05 669 F.2d 0222

MASON, M. VA
84 1 - 04 748 F.2d 0852

MATTHESON LA
85 1 - 05 751 F.2d 1432

MAY TX
90 1 - 05 904 F.2d 0228

MAYO TX
90 1 + 05 893 F.2d 0683

MCCLESKEY GA
87 1 - 11 481 U.S. 0279

MCCORQUODALE GA
83 1 - 11 721 F.2d 1493

MCCOY TX
89 1 - 05 874 F.2d 0954

MCDUGALL NC
90 1 - 04 921 F.2d 0518

MCDOWELL NC
88 1 + 04 858 F.2d 0945

MERCER MO
88 1 - 08 844 F.2d 0582

MESSER, C. FL
87 1 + 11 834 F.2d 0890

MESSER, J. GA
85 1 - 11 760 F.2d 1080

MIDDLETON FL
88 1 + 11 849 F.2d 0491

MILTON TX
84 1 - 05 744 F.2d 1091

MITCHELL GA
85 1 - 11 762 F.2d 0886

MONROE-A LA
84 1 + 05 748 F.2d 0958

MONROE-B LA
88 1 - 05 883 F.2d 0331

MOORE, A. LA
84 1 - 05 740 F.2d 0308

MOORE, CAREY NE
90 1 + 08 904 F.2d 1226

MOORE, CARZELL GA
87 1 + 11 809 F.2d 0702

MOORE, M. TX
82 1 + 05 670 F.2d 0056

MOORE, W. GA
83 1 - 11 716 F.2d 1511

MORGAN GA
84 1 + 11 743 F.2d 0775

MULLIGAN GA
85 1 - 11 771 F.2d 1436

MUNIZ TX
85 1 + 05 760 F.2d 0588

NEVIUS NV
88 1 - 09 852 F.2d 0463

NEWLON MO
89 1 + 08 885 F.2d 1328

O'BRYAN TX
83 1 - 05 714 F.2d 0365

OSBORNE WY
88 1 + 10 861 F.2d 0612

OTEY NE
88 1 - 08 859 F.2d 0575

PALMES FL
84 1 - 11 725 F.2d 1511

PARKER FL
91 1 + 11 111 S.Ct 0731

PARKS OK
90 1 - 10 110 S.Ct 1257

PASTER TX
89 1 - 05 876 F.2d 1184

PEEK GA
86 1 - 11 784 F.2d 1479

PENRY TX
89 1 + 05 492 U.S. 0302

PERRY AR
89 1 - 08 871 F.2d 1384

PETERSON VA
90 1 - 04 904 F.2d 0882

PICKENS AR
83 1 + 08 714 F.2d 1455

PIERRE-SELBY UT
86 1 - 10 802 F.2d 1282

PORTER TX
83 1 - 05 709 F.2d 0944

POTTS-A GA
84 1 + 11 734 F.2d 0526

POTTS-B GA
87 1 + 11 814 F.2d 1512

PREJEAN LA
84 1 - 05 743 F.2d 1091

PROFFITT FL
82 1 + 11 685 F.2d 1227

PRUETT MS
86 1 + 05 805 F.2d 1032

RAULERSON-A FL
80 1 + 05 732 F.2d 0805*

RAULERSON-B FL
84 1 - 11 732 F.2d 0803

RAULT LA
85 1 - 05 772 F.2d 0117

RECTOR AR
91 1 - 08 923 F.2d 0570

REDDIX MS
86 1 + 05 805 F.2d 0506

RICHARDSON AL
89 1 - 11 864 F.2d 1536

RICHMOND-A AZ
78 1 + 09 921 F.2d 0937*

RICHMOND-B AZ
90 1 - 09 921 F.2d 0933

RILES TX
86 1 - 05 799 F.2d 0947

RILEY FL
85 1 - 11 778 F.2d 1544

RINGSTAFF FL
89 1 - 11 885 F.2d 1542

RITTER AL
87 1 - 11 811 F.2d 1398

ROACH SC
85 1 - 04 757 F.2d 1463

ROMERO TX
89 1 - 05 884 F.2d 0871

ROOK NC
86 1 - 04 783 F.2d 0401

ROSS TX
82 1 + 05 675 F.2d 0734

RUFFIN, J. GA
85 1 + 11 767 F.2d 0748

RUFFIN, M. FL
88 1 + 11 848 F.2d 1512

RUIZ-A AR
86 1 + 08 806 F.2d 0158

RUSHING LA
89 1 + 05 868 F.2d 0800

RUSSELL TX
89 1 - 05 892 F.2d 1205

SAWYER LA
90 1 - 05 110 S.Ct 2822

SCOTT FL
89 1 - 11 891 F.2d 0800

SHAW SC
84 1 - 04 733 F.2d 0304

SHRINER FL
83 1 - 11 715 F.2d 1452

SHUMAN NV
87 1 + 09 483 U.S. 0066

SILAGY IL
90 1 - 07 905 F.2d 0986

SIMMONS AR
90 1 - 08 915 F.2d 0372

SINGLETON AL
88 1 - 11 847 F.2d 0668

SKILLERN TX
83 1 - 05 720 F.2d 0839

SMITH, D. FL
86 1 + 11 799 F.2d 1442

SMITH, ELWOOD NC
91 1 - 04 931 F.2d 0242

SMITH, ERNEST TX
81 1 + 05 451 U.S. 0454

SMITH, G. MO
89 1 - 08 888 F.2d 0530

SMITH, JIMMY FL
90 1 + 11 911 F.2d 0494

SMITH, JOHN GA
81 1 - 05 660 F.2d 0573

SMITH, L. TX
86 1 - 05 451 U.S. 0454

SMITH, M. VA
86 1 - 04 477 U.S. 0527

SMITH, R. MT
90 1 + 09 914 F.2d 1153

SMITH, WILLIAM GA
89 1 + 11 887 F.2d 1407

SMITH, WILLIE MS
90 1 - 05 904 F.2d 0950

SOLOMON GA
84 1 - 11 735 F.2d 0395

SONGER FL
84 1 - 11 733 F.2d 0788
85 2 + 11 769 F.2d 1488

SONNIER LA
83 1 - 05 720 F.2d 0401

SPENKELLINK FL
78 1 - 05 578 F.2d 0582

SPIVEY GA
82 1 + 05 683 F.2d 0881

SPRAGGINS GA
83 1 + 11 720 F.2d 1190

STAMPER VA
84 1 - 04 724 F.2d 1106

STANLEY GA
83 1 - 11 697 F.2d 0955

STANO FL
91 1 - 11 921 F.2d 1125

STEPHENS, A. GA
83 1 - 05 716 F.2d 0276

STEPHENS, W. GA
88 1 + 11 846 F.2d 0642

STEWART FL
89 1 - 11 877 F.2d 0851

STOCKTON VA
88 1 + 04 852 F.2d 0740

STOKES MO
88 1 - 08 851 F.2d 1085

STONE FL
88 1 + 11 837 F.2d 1477

STRAIGHT FL
85 1 - 11 772 F.2d 0674

STREETMAN TX
88 1 - 05 835 F.2d 1519

STRICKLAND GA
84 1 + 11 738 F.2d 1542

SULLIVAN FL
83 1 - 11 695 F.2d 1306

SUMMIT LA
86 1 + 05 795 F.2d 1237

TAFERO FL
86 1 - 11 796 F.2d 1314

TAYLOR LA
84 1 - 05 727 F.2d 0341

THIGPEN AL
91 1 + 11 926 F.2d 1003

THOMAS, DANIEL AL
89 1 - 11 891 F.2d 1500

THOMAS, DANIEL FL
85 1 - 11 767 F.2d 0738

THOMAS, DONALD GA
86 1 + 11 796 F.2d 1322

THOMAS, J. GA
86 1 + 11 800 F.2d 1024

THOMPSON, J. TX
87 1 - 05 821 F.2d 1054

THOMPSON, W. FL
86 1 - 11 787 F.2d 1447

TROEDEL FL
87 1 + 11 828 F.2d 0670

TUCKER, R. GA
85 1 - 11 776 F.2d 1487

TUCKER, W. GA
86 1 - 11 802 F.2d 1293

TURNER VA
86 1 + 04 476 U.S. 0028

TYLER GA
85 1 + 11 755 F.2d 0741

VICKERS AZ
86 1 + 09 798 F.2d 0369

WALLACE GA
85 1 + 11 757 F.2d 1102

WASHINGTON, D. FL
84 1 - 05 737 F.2d 0894

WASHINGTON, J. MS
81 1 + 05 655 F.2d 1346

WATSON LA
85 1 - 05 756 F.2d 1055

WAYE VA
89 1 - 04 884 F.2d 0762

WELCOME LA
86 1 - 05 793 F.2d 0672

WESTBROOK GA
84 1 + 11 743 F.2d 0764

WHEAT MS
86 1 + 05 793 F.2d 0621

WHITE, B. FL
87 1 - 11 809 F.2d 1478

WHITE, L. TX
83 1 + 05 720 F.2d 0415

WHITLEY VA
86 1 - 04 802 F.2d 1487

WICKER TX
86 1 - 05 783 F.2d 0487

WILLIAMS, A. TX
87 1 - 05 809 F.2d 1063

WILLIAMS, C. TX
87 1 - 05 826 F.2d 0011

WILLIAMS, D. MO
85 1 - 08 763 F.2d 1363

WILLIAMS, H. GA
88 1 - 11 846 F.2d 1276

WILLIAMS, R. LA
82 1 - 05 679 F.2d 0381

WILLIE LA
84 1 - 05 737 F.2d 1372

WILLIS GA
88 1 - 11 838 F.2d 1510

WILSON GA
85 1 + 11 777 F.2d 0621

WINGO LA
86 1 - 05 786 F.2d 0654

WITT FL
85 1 - 11 469 U.S. 0412

WOODARD AR
86 1 + 08 806 F.2d 0153

WOODS FL
91 1 + 11 923 F.2d 1454

WOOLLS TX
86 1 - 05 798 F.2d 0695

WOOMER SC
88 1 - 04 856 F.2d 0677

YOUNG, C. GA
82 1 + 11 677 F.2d 0792

YOUNG, J. GA
84 1 - 11 727 F.2d 1489

ZETTLEMOYER PA
91 1 - 03 923 F.2d 0284

APPENDIX C

ANALYSIS OF PUBLISHED FEDERAL CIRCUIT OPINIONS IN NONCAPITAL HABEAS CASES, VARIOUS YEARS, STATES AND CIRCUITS¹

¹ An explanation of Tables I and II follows Table II.

TABLE I

GRANTS IN ALL PUBLISHED HABEAS CASES
AND IN PUBLISHED HABEAS CASES
NOT INVOLVING NEW LAW, NEW FACTS, OR
EVIDENCE OF UNREASONABLENESS
ALL STATES, 1988-89

	Total Decisions	Merits Decisions	Total Grants	Grants New Law or Fact	Total Grants/ 1000 Petns Filed
ALL STATES	442	359	75	8	3.71
ALABAMA	25	22	4	0	4.25
ALASKA	3	3	1	0	18.18
ARIZONA	8	7	0	0	N/A
ARKANSAS	36	31	5	3	13.05
CALIFORNIA	13	8	2	0	N/A
COLORADO	2	1	0	0	0.00
CONNECTICUT	5	5	1	0	7.94
DELAWARE	1	0	0	0	0.00
FLORIDA	35	30	3	0	2.28
GEORGIA	15	9	2	0	3.25
HAWAII	2	1	0	0	0.00

C-2

	Total Decisions	Merits Decisions	Total Grants	Grants New Law or Fact	Total Grants/ 1000 Petns Filed
IDAHO	2	1	0	0	0.00
ILLINOIS	27	25	5	2	10.33
INDIANA	12	10	2	0	4.12
IOWA	8	8	0	0	0.00
KANSAS	2	1	1	0	7.46
KENTUCKY	16	15	7	1	14.89
LOUISIANA	25	23	5	0	6.40
MAINE	2	2	0	0	0.00
MARYLAND	3	2	0	0	0.00
MASSACHUSETTS	10	8	2	0	14.18
MICHIGAN	9	6	2	0	2.71
MINNESOTA	4	4	0	0	0.00
MISSISSIPPI	5	5	1	0	4.02
MISSOURI	19	16	1	0	1.30
MONTANA	3	2	1	0	13.16
NEBRASKA	8	7	2	1	17.09
NEVADA	4	2	0	0	0.00
NEW HAMPSHIRE	1	1	1	0	23.81
NEW JERSEY	6	6	4	0	8.73
NEW MEXICO	10	10	3	0	19.74
NEW YORK	30	19	3	0	2.15

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	Total Decisions	Merits Decisions	Total Grants	Grants New Law or Fact	Total Grants/ 1000 Petns Filed
NORTH CAROLINA	1	1	0	0	0.00
NORTH DAKOTA	1	1	0	0	0.00
OHIO	12	10	3	0	4.62
OKLAHOMA	1	1	0	0	0.00
OREGON	1	1	1	0	5.03
PENNSYLVANIA	10	4	1	0	0.91
RHODE ISLAND	0	0	0	0	0.00
SOUTH CAROLINA	2	1	0	0	0.00
SOUTH DAKOTA	2	2	1	0	26.32
TENNESSEE	6	6	1	0	2.08
TEXAS	25	18	7	1	4.36
UTAH	0	0	0	0	0.00
VERMONT	0	0	0	0	0.00
VIRGINIA	4	4	0	0	0.00
WASHINGTON	14	10	3	0	7.71
WEST VIRGINIA	0	0	0	0	0.00
WISCONSIN	12	10	0	0	0.00
WYOMING	0	0	0	0	0.00

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TABLE II
BETWEEN-STATE DISPARITIES
IN HABEAS "GRANT" RATES WITHIN CIRCUITS
IN PUBLISHED CIRCUIT OPINIONS
5TH, 6TH, 7TH CIRCUITS, 1987-90

State	Total Grants/ Merits Decns-#	Total Grants/ Merits Decns-%	Total Grants/ 1000 Petns Filed
CA6	20/67	30%	4.36
KY	9/24	38%	10.73
OH	6/16	38%	4.41
MI	4/16	25%	2.91
TN	1/11	9%	.99
CA7	20/112	18%	8.34
IL	15/67	22%	14.22
IN	4/22	18%	4.46
WI	1/23	4%	2.24
CA5	21/95	22%	4.09
TX	12/38	32%	3.80
MS	3/14	21%	6.09
LA	6/43	14%	4.04

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Explanation of Tables I and II: The data presented in this Appendix were derived from all published state-prisoner habeas corpus decisions in noncapital cases in the Federal Second Reporter volumes covering the years 1988 and 1989 (vols. 838-889). To expand the pool of cases for more refined study in selected circuits, all published habeas decisions in the 5th, 6th, and 7th Circuits in the Federal Second Reporter volumes covering the years 1987 and 1990 (vols. 810-37, 890-922) also were analyzed. Arranging the data by convicting State, Table I reports: (1) the total number of noncapital state-prisoner habeas corpus decisions ("Total Decisions"); (2) the number of decisions on the merits of the petitioners' claims and/or the respondents' defenses ("Merits Decisions");² (3) the number of decisions in which relief was granted on some claim ("Total Grants"); (4) the number of decisions in which the relief granted was premised on either law or facts that were not before the state courts at the time they reviewed the same criminal judgment ("Grants New Law or Fact");³ and (5) the number of decisions granting relief to prisoners convicted in each State per 1000

² Most nonmerits decisions involved "exhaustion of remedies" questions. Decisions that turned on such defenses as procedural default, nonretroactivity, and abuse of the writ were classified as merits decisions.

³ At this stage, a search was made for references to bad faith or unreasonable conduct by the reviewing state judges. No such references were found.

petitions filed by prisoners incarcerated in the that State for the corresponding years ("Total Grants/1000 Petitions Filed").⁴ To account for varying circuit policies in regard to publishing habeas decisions, Table II presents intra-circuit comparisons, by State, of (1) the proportion of merits decisions in which habeas relief was granted and (2) the number of decisions in which habeas relief was granted per 1000 habeas petitions filed.

⁴ Data on numbers of petitions filed were taken from the Annual Reports of the Administrative Office of the United States Courts. To account for the fact that circuit decisions are rendered after the filing date, filing data from a period commencing and ending earlier than the circuit decisions commenced and ended were used. (Table I reports filing data from fiscal years 1988-89 and decisions from calendar years 1988-89; Table II reports filing data from fiscal years 1986-89 and decisions from calendar years 1987-90).

IN THE

Supreme Court of the United States**October Term, 1991**ELLIS B. WRIGHT, JR., WARDEN, *et al.*,*Petitioners,**against*

FRANK ROBERT WEST, JR.,

*Respondent.*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT**Brief of the States of New York and Ohio *Amicus Curiae*
in Support of Respondent on the Issue of *De Novo* Review**

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(1833—LC5-719—1992)

i.

Question Presented

This brief will address the following question:

In determining whether to grant a petition for writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?

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Case No. 91-542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991.

ELLIS B. WRIGHT, JR., WARDEN, *et al.*,

Petitioners,

against

FRANK ROBERT WEST, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

**Brief of the States of New York and Ohio *Amicus Curiae*
in Support of Respondent on the Issue of *De Novo*
Review**

Interest of Amicus Curiae

This case presents the question whether a habeas corpus court should continue to review *de novo* the state court's application of constitutional law to the facts. Resolution of this issue hinges upon the proper construction of the statute authorizing habeas corpus for state prisoners, 28 USC §§ 2241 *et seq.*, and prior caselaw from the Court. The amici states have an interest in allowing Congress to have sufficient opportunity to act in this area, as well as an interest in preserving the finality of state court decisions while protecting individual rights.

Summary of Argument

Notwithstanding the significant interests of finality and comity, it is our view that the balance of considerations militates in favor of the present rule of *de novo* review for claims of abridgement of constitutional rules implicating fundamental fairness and accuracy. Chief among the considerations is that habeas corpus is governed by statute, 28 USC §§ 2241 *et seq.* The statute has long been interpreted by this Court to require *de novo* review of this type of case by the federal court in a habeas proceeding. The rule of *de novo* review is implicit in the earliest cases applying the statute, adumbrated in *Moore v. Dempsey*, 261 US 86 (1923), clearly stated in *Brown v. Allen*, 344 US 443 (1953), and unquestioned since *Brown*. No special circumstances warrant a sweeping departure from the long-settled rule as suggested by the question posed by this Court.

ARGUMENT

The Court should not announce a sweeping rule abandoning *de novo* review of application by state courts of federal constitutional law to the facts as suggested by the question posed by this Court.

Habeas corpus entails significant costs. It significantly affects finality in criminal litigation. It intrudes upon " 'the State's sovereign power to punish offenders and their good faith attempts to honor constitutional rights' ". *Coleman v. Thompson*, ____ US ____, 111 S Ct 2546, 2564, 115 L ed 2d 640, 668 (1991). Moreover, considerations of federalism and comity "counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants". *Cabana v. Bullock*, 474 US 376, 391 (1986). The very low rate of success for prisoners challenging New York decisions in habeas corpus—three percent¹—establishes that generally state courts are correctly applying federal constitutional law. These are weighty considerations militating in favor of a rule of deference to reasonable state court decisions as a matter of policy.

However, on the other side of the scale, are a number of considerations which, in our view, outweigh the interests of finality and comity. Chief among them is that habeas corpus is a statutory matter and the statute embodies the rule long settled in this Court that ultimate constitutional issues are a matter for *de novo* review. The statute reflects the Congressional judgment as to the extent of the "need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty". *Stone v. Powell*, 428 US 465, 491-492 n 31 (1976). The Court should not

¹Faust, Rubenstein & Yackle, The Great Writ in Action: Empirical Light on the Habeas Corpus Debate, 18 NYU Rev L & Soc. Change 637, 680 (1991).

utilize this case to announce a sweeping rule abandoning the long-standing practice of *de novo* review, as suggested by the question posed by the Court. The Court should also allow Congress to have an opportunity to deal with the general issue of habeas corpus reform.

In the Judiciary Act of February 5, 1867, ch 28, § 1, 14 Stat 385, Congress expressly vested "plenary power" in the federal courts; they were to "proceed in a summary way to determine the facts of the case * * * and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty". *Wingo v. Wedding*, 418 US 461, 468 (1974); see *Holiday v. Johnston*, 313 US 342 (1941). The legislation enlarged for the federal courts the very limited grounds for habeas review of state actions previously afforded. *Hawk v. Olson*, 326 US 271, 274-275 (1945); *In re Neagle*, 135 US 1, 69-72 (1890); see, Note, 61 Harvard L Rev 657, 658-659 (1948).

When the provisions of the Habeas Corpus Act were revised and consolidated in 1948 into 28 USC 2241, *et seq.*, although some words were deleted, there was no change in this regard (§ 2243). *Wingo*, 418 US at 468-469. Nothing in the legislative history indicates that Congress, by adoption of the 1948 recodification, intended to restrict the district court's consideration of petitions raising the same issues already resolved in the state courts. *Brown v. Allen*, 344 US 443, 462-463 (1953). Thus, it was no departure from the statute when this Court stated in *Brown* that:

"A federal judge on a habeas application is required to 'summarily hear and determine the facts and dispose of the matter as law and justice require', 28 USC § 2243. This has long been the law" (344 US at 462).

Further, the conclusions in the opinions² in this connection that the state adjudication was not *res judicata* but carried the weight that federal practice gives to the conclusions of a court of last resort of another jurisdiction on constitutional issues, 344 US at 458, 506, was simply a further explanation of the earlier examination of the statute. Justice Frankfurter wrote:

"Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misperceived a federal constitutional right" (344 US at 508).

Brown did not break new ground in this regard, although it represented the clearest statement of the principle. As demonstrated *infra*, pp 9-11, it correctly interpreted the statute as originally conceived. It also represented no departure from earlier cases such as *Moore v. Dempsey*, 261 US 86 (1923), where habeas was authorized to review a claim that a state trial had been mob dominated, notwithstanding that the State appellate court had reviewed the issue and found no error. See *Sumner v. Mata*, 449 US 539, 543-544 (1981).³

²The opinion of Justice Reed and that of Justice Frankfurter both represented the opinion of the Court. 344 US at 451-452. Justices Black and Douglas agreed in substance (344 US at 513) as did Justices Burton and Clark (344 US at 488).

³Professor Bator argued, citing cases like *Ex Parte Hawke*, 321 US 114 (1944), that *Brown* did break new ground. Bator, *Finality in Criminal Law and Habeas Corpus For State Prisoners*, 76 Harvard L Rev 441, 493-499 (1963). He argued that *Moore* was based on the inadequacy of the state process. 76 Harvard L Rev at 488-489 & n 131. We think the better reading of *Moore* is that the Court contemplated *de novo* review in stating that habeas corpus would lie when "counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and * * * the state courts failed to correct the wrong", notwithstanding "perfection in the machinery for correction * * *". 261 US at 91.

Subsequent to *Brown v. Allen*, there was a vigorous campaign in Congress to revise habeas corpus to require deference to state courts. Proposed amendments, which passed the House but not the Senate, precluded habeas when there had been a "fair and adequate opportunity" to raise the issue in the State court. HR5649, HR Rep. No. 1200, 84th Cong, 1st Sess. (April 11, 1955); HR8361, HR Rep. No. 1293, 85th Cong, 2d Sess. (Jan. 23, 1958); see, *Pollak*, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale Law Journal 50 (1956). This campaign culminated in the 1966 Amendments to sections 2244 and 2254. PL 89-711, 80 Stat 1104. Most pertinently, a new subsection d was added to section 2254 which provided that the State court fact findings "shall be presumed to be correct" unless one of eight factors bringing into question the fairness of the procedures employed by the State court was established. Section 2243 was not amended and the amendment which became section 2254(d) limited the plenary power of the habeas court only with respect to State court fact findings.

The 1966 amendments have "generally been understood as a codification of" *Townsend v. Sain*, 372 US 293, 318 (1963), which followed *Brown v. Allen* in recognizing the deference due to state court findings of fact, but requiring plenary review of legal questions. Wright-Miller-Cooper, 17A Federal Practice and Procedure § 4265.1, p 404 (1988). "[T]here is absolutely no indication that [Congress] intended to alter Townsend's understanding that the 'ultimate constitutional question' * * * was * * * subject to plenary federal review". *Miller v. Fenton*, 474 US 104, 112 (1985); see also, *Sumner v. Mata*, 455 US 591, 597 (1982); *Stone v. Powell*, 428 US at 528.

The House Report establishes that no change was intended. HR Rep. No. 1892, 89th Cong, 2d Sess. (Aug. 25, 1966). The report (pp 5-7) discussed the controversy raised by *Brown v.*

Allen and noted *Townsend v. Sain* and described the efforts of the Judicial Conference, beginning in 1953, to address the issue. The Conference had created a Committee on Habeas Corpus to examine the matter. While that Committee had first proposed to remove all habeas jurisdiction from federal courts, that was rejected in favor of a proposal that three judge courts be utilized. That proposal was also rejected as too cumbersome, and the Committee settled on the proposals which became law.

The House report stated (p 3) that the purpose of the new provisions was as stated by the Judicial Conference:⁴

"* * * to provide for a qualified application of the doctrine of *res judicata* to an extent we regard as needed and desirable to proceedings on applications for habeas corpus in the U.S. courts * * * and by statutory enactment to create reasonable presumptions and fix the party on whom the burden of proof, as to certain factual issues, shall rest in such proceedings, but without the impairment of any of the substantive rights of the applicant" (3 1966 US Code Cong & Admin News, p 3671).

In no decision since the 1966 amendments has this Court suggested that the amendments altered the rule that the review by the habeas corpus court was to be plenary. On the contrary, since 1966 this Court has regularly and unequivocally held that *de novo* review of questions of constitutional law is required, although section 2254(d) requires deference to state court fact finding. *Miller v. Fenton*, 474 US at 111-112; *Strickland v. Washington*, 466 US 668, 698 (1984); *Rushen v.*

⁴The report of the Judicial Conference's Committee on Habeas Corpus was appended to and made part of the House as well as the Senate Report, S Rep. No. 1797, 89th Cong, 2d Sess. (Oct. 18, 1966).

Spain, 464 US 114, 120 (1983); *Sumner v. Mata*, 455 US at 597; *Cuyler v. Sullivan*, 446 US 335, 341-342 (1980).

We note, moreover, that there is presently pending before Congress legislation to reform habeas corpus. On July 11, 1991 the Senate passed an omnibus crime bill containing habeas corpus provisions, including an amendment to section 2254 providing that an application for a writ "shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings." 137 Cong Rec S9832 (daily ed July 11, 1991) (text of S1241, 102d Cong, 1st Sess., see, 137 Cong Rec. S9982, S9999-10001 [daily ed July 15, 1991]). On October 17, 1991, the House of Representatives, in the course of considering its own omnibus crime bill which contained habeas corpus provisions, but did not change prior law on *de novo* review (HR3371, title XI, HR Report 102-242, 102d Cong., 1st Sess, pp 21-24) rejected an amendment offered by Representative Hyde which would, in essence, have substituted for habeas corpus, the full and fair adjudication standard adopted by the Senate. 137 Cong Rec H7996-8005 (daily ed Oct. 17, 1991); see also H8168-8173 (daily ed Oct. 22, 1991) (motion to recommit). The House passed its bill on October 22, 137 Cong. Rec. H8173 (daily ed Oct. 22, 1991). The House resolution of this issue was approved by the Conference Committee on November 24. See, Conference Report to accompany HR3371; 137 Cong. Rec. H11686-11744 (daily ed Nov. 26, 1991). On November 26, 1991, the full House approved the omnibus crime bill as reported by the Conference Committee. 137 Cong Rec H11757 (daily ed Nov. 26, 1991). The measure is pending in the Senate a vote on cloture having failed on November 27. 137 Cong. Rec. S18616 (daily ed Nov. 27, 1991).⁵

⁵In addition, legislation to require deference had passed the House but not the Senate in 1955 (*supra*, p 6). Such legislation had passed the Senate but not the House in 1984. 130 Cong Rec S1854-72 (1984); see, S Rep No. 98-226, 98th Cong, 1st Sess. (Sept. 14, 1983). The 1966 amendments represent the farthest reach of Congressional willingness to limit the plenary power of the habeas court.

An analogous situation confronted this Court in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Devel. Commn.*, 461 US 190 (1983). There, the House had also declined to accept a proposed amendment already accepted by the Senate in legislation under consideration contemporaneous with Supreme Court consideration of the issue. Under such circumstances, the Court said that it would "appear improper for us to give a reading to the Act that Congress considered and rejected". 461 US at 220.

In any event, *Brown v. Allen* correctly interpreted the statute as originally conceived with respect to plenary review. Nothing in the 1867 statute referred to or required deference to state court determinations. On the contrary, the statute provided for the habeas court to "proceed in a summary way to determine the facts of the case" and, "if it shall appear that the petitioner is deprived of his liberty in contravention of the constitution", he must "forthwith be discharged". Further, the statute contemplated interlocutory challenges to state criminal proceedings, and expressly gave the habeas court the power to enjoin such proceedings. *Mitchum v. Foster*, 407 US 225, 234-235 & n 16 (1972).

The intent of Congress in 1867 with respect to plenary review must be viewed in its common law context. See, *Allen v. McCurry*, 449 US 90, 99-100 (1980). The preclusion rules of *res judicata* had no place in the common law of habeas corpus. *Salinger v. Loisel*, 265 US 224, 230 (1924); see Church, Writ of Habeas Corpus, § 386 (2d ed 1893). The decision of a court without jurisdiction was considered a "nullity", so by definition it had no subsequent force or effect. See *In re Lange*, 18 Wall 163 (1873); Bailey on Habeas Corpus §§49-51 (1913).

That plenary review was intended is confirmed by the early decisions of the Court. Shortly after its passage, this Court recognized the "most comprehensive character" of the legis-

lation. "It is impossible to widen this jurisdiction". *Ex Parte McCardle*, 73 US 318, 326 (1867).⁶ In *In re Neagle*, 135 US 1 (1890), this Court affirmed the granting of the writ by the circuit court for a State prisoner, a Deputy Marshall of the United States charged with murder, whose trial was pending. The Court, placing the 1867 Act in the context of prior grants of habeas corpus jurisdiction, 135 US at 69-72, noted the "broad ground" of the statute and the plenary power of the habeas court to consider the facts and direct release. 135 US at 72.

In *Ex Parte Royall*, 117 US 241 (1886), the Court in upholding denial of the writ pending consideration of the claim in question by the state court and completion of state proceedings, explicitly acknowledged the power of the habeas court to entertain the writ following conviction and to direct release if the State court lacked jurisdiction. 117 US at 247, 253. Likewise, in *Cook v. Hart*, 146 US 183 (1892), it was stated that objections should first be raised in the State courts, but "[s]hould * * * [his] rights be denied, his remedy in the Federal court will remain unimpaired". See also, *Minnesota v. Brundage*, 180 US 499, 501-502 (1901); *In re Friedrich*, 149 US 70, 76-77 (1892). Admittedly, the scope of habeas corpus during this period was limited to questions of "jurisdiction" (*Wainwright v. Sykes*, 433 US 72, 77-79 [1977]), but the decisions evidenced the plenary power of the habeas court with respect to issues within its scope. See, *Fay v. Noia*, 372 US 391, 418-421 (1963). Significantly, Justice Harlan, although otherwise dissenting, agreed on this point in *Fay*. 372 US at 454. See generally, Church on Habeas Corpus §84 (2d ed 1893).

⁶There are no decisions following *McCardle* until 1886. The Supreme Court's jurisdiction in this class of cases was removed by the Act of March 27, 1868, ch 34, § 2, 15 Stat 44. Jurisdiction was restored by the Act of March 3, 1885, ch 353, 23 Stat 437.

Professor Bator's survey of the cases is not to the contrary. Bator, 76 Harvard L Rev at 465-474, 478-483. In our view, the gravamen of his argument is that the Congress in 1867 did not intend an expansion of the scope of habeas corpus to convert it into an ordinary writ of error. 76 Harvard L Rev at 475. His discussion of the cases confirms that while their scope was limited to "jurisdictional" issues, the habeas court's power was plenary.

In sum, it seems to us that with respect to *de novo* review, the rule of *Brown v. Allen* properly interpreted the habeas corpus statute as originally conceived. The legislative history of the 1966 amendments confirms the correctness of that reading.

In addition to considerations of statutory construction, those of *stare decisis* also weigh "heavily against any suggestion that [the Court] now discard the settled rule in this area." *Miller v. Fenton*, 474 US at 115. As demonstrated *supra*, the rule is implicit in the earliest cases and in *Moore v. Dempsey*. In any event, no one disputes that, except for *Stone v. Powell*, which has been limited to the Fourth Amendment context (see, Wright-Miller-Cooper, 17A Federal Practice and Procedure, § 4263.1 [1988]), the rule of *de novo* review was clearly stated in *Brown v. Allen* and has been unquestioned since. In *Jackson v. Virginia*, 443 US 307 (1979), this Court applied the rule of *de novo* review in a case raising the issue of proof beyond a reasonable doubt. The Court expressly declined to employ the rule of deference adopted in *Stone v. Powell*. 443 US at 323-324.

We do not believe there is the requisite "special justification" for departure from the doctrine of *stare decisis*. *Patterson v. McClean Credit Union*, 491 US 164, 172 (1989). On the contrary, weighty considerations counsel against the wholesale change in the settled role of *de novo* review that the additional question posed by the Court suggests.

The long-standing rule of *de novo* review is ultimately predicated upon the "need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty", notwithstanding the resulting intrusion upon important values, which include finality in criminal trials and the minimization of friction between the federal and state systems of justice. *Stone v. Powell*, 428 US at 491-492, n 31. A prisoner retains a "powerful and legitimate interest in obtaining his release from custody if he is innocent". *Kuhlmann v. Wilson*, 477 US 436, 452 (1986) (plurality); see, Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments", 38 U Chicago L Rev 142, 149-154 (1970).

The additional safeguard purpose is reflected in the exceptions recognized in the recent retroactivity cases. Generally, "new rules" may not be the basis for habeas corpus. *Sawyer v. Smith*, ____ US ____, 110 S Ct 2822, 111 L ed 2d 193 (1990). However, there are two exceptions. Pursuant to the second exception, a habeas proceeding may be predicated upon a new rule if the new rule implicates "bedrock procedural elements essential to the fairness of the proceeding". *Sawyer v. Smith*, 110 S Ct at 2831, 111 L ed 2d at 211. *Teague v. Lane*, 489 US 288 (1989) (plurality), which created this exception,⁷ grounded it upon Justice Harlan's reasoning in *Desist v. United States*, 394 US 244, 262 (1969), that "one of the two principal functions (of habeas corpus) was 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted' ". While the retroactivity question has been resolved by reference to the deterrence function of the writ, *Saffle v. Parks*, 494

⁷The exact scope of this exception is unclear. *Teague* stated that it covered only elements of procedural fairness which are "an 'absolute prerequisite' to fundamental fairness". 489 US at 314.

US 484, 488 (1990), the purport of the retroactivity cases is not that this is now the only recognized purpose of habeas corpus. Rather, their purport is that the interests of comity and finality "outweigh" the other purpose—the need for an additional safeguard—in the retroactivity context, except for new rules implicating bedrock procedural elements. See, Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, *The Supreme Court Review*, 165, 177-180 (1989).

The additional safeguard purpose warrants *de novo* review when any claim of abridgement of constitutional rules implicating fundamental fairness and accuracy is implicated. Such protections include assurance that confessions are voluntary. *Miller v. Fenton*, *supra*; see, *Jackson v. Denno*, 378 US 368, 376 (1964). Other like protections include the right to counsel (*Johnson v. Zerbst*, 304 US 458 [1938]) and freedom from conviction based on the knowing use of false evidence. *Mooney v. Holohan*, 294 US 103 (1935).

What is ultimately at stake with respect to the question posed by this Court is the extent of a prisoner's claim on a federal forum. Certainly, there is no "intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the applicable federal law than his neighbor in the state courthouse". Bator, 76 Harvard L Rev at 509. Nevertheless, Professor Bator recognized that "[i]mportant values may be served by having federal judges pass on federal issues." 76 Harvard L Rev at 510:

"Even in a very general sense a federal judge, operating within a different system and with a differently defined set of institutional responsibilities, may bring to bear on such issues an objectivity, a freshness and insight which may have been denied to the state judge,

no matter how conscientious, whose perspective will be subtly shaped by implicit assumptions derived from his responsibilities within the state institutional framework, who stands within *that* system. More particular considerations may be mentioned too. The federal judge is independent by constitutional guarantee; the state judge may not be. The difference surely does bear on conditions necessary for principled judging; it is, at least, a common assumption—perhaps implicit in the Constitution itself—that state courts may be more responsive to local pressures, local prejudices, local politics, than federal judges. And there is, too, the fear that state officials, including judges, will somehow be less sympathetic or generous with respect to federal claims raised by state prisoners than federal judges” (footnotes omitted).

In this regard, the sense of unfairness which may result from the Supreme Court’s inability to consider every case on direct review is also a consideration. This Court can take only a “token”⁸ of state criminal convictions on direct review and it chooses “important” issues; otherwise the Court could not fulfill its vast responsibilities. “Unimportant” cases, although wrong, find no remedy. *Brown v. Allen*, 344 US at 491 (opinion of Justice Frankfurter). This raises questions of fairness. See, *Bator*, 76 Harvard L Rev at 514;

“[T]he state prisoner in an important case does have one more chance to persuade a set of judges—and judges, perhaps, of superior objectivity and fresher perspective with respect to matters of federal law—to see the case his way than a prisoner in an unimportant case. And this is a real difference”. 76 Harvard L Rev at 514.

⁸Wechsler, *Habeas Corpus and The Supreme Court*, 59 U of Col L Rev 167, 182 (1988).

The harm caused by the failure to treat similarly situated defendants alike is a “weighty and important consideration.” *Bator*, 76 Harvard L Rev at 514.

The additional safeguard function of habeas corpus will be substantially depreciated if the habeas court is required to defer on claims of abridgement of constitutional rules implicating fundamental fairness and accuracy to State court decisions which are “reasonable” interpretations of constitutional requirements. In *Stone v. Powell*, the Court held with respect to Fourth Amendment claims that if the State has provided an opportunity for full and fair litigation of the claim, a State prisoner may not be granted habeas corpus on the ground that evidence seized unconstitutionally was introduced at his trial. Under *Stone*, “it will be a rare case indeed in which the federal habeas court will now be able to reach the merits of a Fourth Amendment claim”. Wright-Miller-Cooper, 17A Federal Practice and Procedure, §4263.1, pp 332-333 (1988).

This Court recognized in *Stone* that “reasonable” interpretations are not sufficient when fundamental principles are at stake. 428 US at 491-492, n 31. See, *Jackson v. Virginia*, 443 US at 323, distinguishing *Stone* on that basis. This Court itself has granted habeas relief in numerous cases in recent years where state courts had dismissed the constitutional claim.⁹ Except for cases involving an absence of state procedures to consider the issue, there will always be a state court opinion because habeas corpus does not lie until all claims have been exhausted in the state court. 28 USC § 2254(b), (c); *Rose v. Lundy*, 455 US 509 (1982). There is no question that, for the most part, the state court decisions in such cases were reasonable, as the dissents agreeing with them in this Court in many

⁹See, e.g., *Maynard v. Cartwright*, 486 US 356 (1988); *Kimmelman v. Morrison*, 477 US 365 (1986); *Vasquez v. Hillery*, 474 US 254 (1986); *Wainwright v. Greenfield*, 474 US 284 (1986); *Miller v. Fenton*, 474 US 104 (1985); *Francis v. Franklin*, 471 US 307 (1985); *Solem v. Helm*, 463 US 277 (1983).

such cases prove. See, e.g., *Francis v. Franklin*, 471 US at 331 (Rehnquist, J., dissenting); *Solem v. Helm*, 463 US at 304 (Burger, J., dissenting); *Jackson v. Denno*, 378 US 368, 427 (1964) (Harlan, J., dissenting). The point is that implicit in all these decisions is the judgment by this Court that the constitutional right at issue was sufficiently compelling so that independent review of the claim was warranted.

The opportunity for *de novo* review of certain constitutional law decisions, such as the right to competent counsel and an impartial tribunal, is especially important in death penalty cases. Chief Judge Godbold has noted that habeas corpus relief was granted in one half of the first 56 death penalty cases to come before the 11th Circuit. Mikva and Godbold, *You Don't Have to Be a Bleeding Heart*, 14 Hum Rights 22, 23 (1987). See, Amsterdam, *In Favorem Mortis: The Supreme Court and Capital Punishment*, 14 ABA Sec. Individual Rts & Resp 14 (1987) (between 1978 and 1983, of 41 appeals involving death sentences in federal courts of appeal, 73.2% were decided in favor of the prisoner). In an elaborate study for the American Bar Association, Professor Liebman demonstrated that from 1976 to 1991 federal courts had found constitutional violations in just over 40 percent of all capital habeas corpus cases. Liebman Memorandum dated July 15, 1991, annexed to Curtin Testimony before the Subcommittee of Civil and Constitutional Rights of the Comm. on Judic., H. of Rep., 102d Cong., 1st Sess. (July 17, 1991).

A decision requiring federal courts to defer to reasonable state court applications of constitutional requirements in all cases when fundamental principles are at stake would represent a return to the discredited rule of *Frank v. Mangum*, 237 US 309 (1915). In that case, the Court denied petitioner, a Jewish man convicted and sentenced to death for the rape and murder of a Christian woman, the opportunity to relitigate his claim that his trial had been dominated by an anti-semitic

mob. The Court based its decision upon its conclusion that the Georgia Supreme Court "upon a full review, decided appellant's allegations * * * to be unfounded". 237 US at 335. Justice Holmes dissented. His view, which prevailed in *Moore* eight years later, was that federal courts "must examine" such issues independently—"[o]therwise the right will be a barren one". 237 US at 347-348.

Consistent with "[e]xpanded concepts of fairness", *Jackson v. Denno*, 378 US at 390, *Frank v. Mangum* has been discredited. The principle of wholesale deference for which *Frank* stands is incompatible with the principle that habeas corpus should provide an added insurance of accuracy when fundamental principles of procedural fairness are at stake.

CONCLUSION

This Court should not utilize this case to announce a sweeping rule, as suggested by the question presented by this Court, that departs from the longstanding rule that a federal court in a habeas corpus action must review *de novo* the state court's application of constitutional law to the facts.

Dated: Albany, New York
February 27, 1992

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MAR 3 1992

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

ELLIS B. WRIGHT, JR., *et al.*,

Petitioners,

—v.—

FRANK ROBERT WEST, JR.,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF *AMICUS CURIAE* OF THE
AMERICAN CIVIL LIBERTIES UNION
AND THE ACLU OF VIRGINIA
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICI¹

The American Civil Liberties Union is a nationwide, nonpartisan organization of nearly 300,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Virginia is one of its statewide affiliates.

The ACLU has long worked to protect the rights of criminal defendants and their access to the federal courts and has filed many briefs, as direct counsel or as *amicus curiae*. We respectfully submit this brief *amicus curiae* because the resolution of this case may well affect the continued availability of the federal courts as a meaningful forum for the correction of constitutional errors by state tribunals.

STATEMENT OF THE CASE

Respondent, Frank West, was convicted of larceny in Westmoreland County, Virginia. Under Virginia law, the jury was permitted to infer from West's possession of stolen property that he, in fact, had stolen it. On appellate review in state court and in state habeas corpus proceedings, West claimed that the evidence introduced against him at trial was insufficient to support conviction beyond a reasonable doubt under this Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979). He raised the same claim in a federal habeas corpus petition. The district court denied relief, but the United States Court of Appeals for the Fourth Circuit concluded that the *Jackson* claim was meritorious and awarded relief.

The warden sought a writ of *certiorari* on two questions: (1) whether a federal court could award habeas corpus relief "merely because it disagree[d]" with the

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

"good faith reasonable decision of the state courts," and (2) whether the Fourth Circuit's decision "fundamentally alter[ed]" the standard in *Jackson* inasmuch as it "vacate[d] a state conviction" on the basis of "nothing more" than "concern" about "a deeply-rooted common law principle that the prisoner never raised in state court."

When this Court granted review, it asked the parties to brief a third question: whether the federal habeas courts generally should defer to state court applications of law to the facts of specific cases. This brief concentrates on this third question, put by the Court itself.

SUMMARY OF ARGUMENT

The question on which this Court has called for briefs is controlled by explicit jurisdictional statutes stretching back to Reconstruction. The 1867 Habeas Corpus Act conferred jurisdiction on the federal courts to entertain petitions from state prisoners and to award relief to any prisoner whose detention is found to violate federal law. In *Brown v. Allen*, 344 U.S. 443 (1953), this Court construed the 1867 Act to require the federal habeas courts to exercise independent judgment on the application of legal standards to the facts of specific cases.

In amendments to the statutes in 1966, Congress acted on the premise established in *Brown*. There can be no question that the 1966 legislation codified yet again the federal courts' longstanding authority to make independent judgments on prisoners' federal claims, notwithstanding previous judgments in state court.

The Commonwealth of Virginia and some other *amici* disapprove Congress' political decision to confer on the federal courts the authority to review state court applications of law to fact *de novo*. They have tried for years to persuade Congress to change its policy in this respect, but they have failed. Now they ask this Court to substitute its own policy prescription for that of Congress

and, effectively, to challenge Congress to reenact its position yet again -- this time by enough votes to override a presidential veto.

The Court cannot permit itself to be used in this way without violating Congress' authority under Article III of the Constitution to determine the jurisdiction that the federal courts shall have. This Court cannot validly invade the prerogatives of the political branch; it cannot legislate *for* Congress. Rather, under the separation-of-powers principle, the Court must accept Congress' policy choices.

The effects of establishing a rule of deference in law-application cases would be either to eliminate federal habeas corpus for state prisoners or to saddle the federal courts with burdensome duties of questionable value. Either the federal courts would routinely give state judgments preclusive effect, or they would attempt to enforce a shadow set of standards that track with, but do not match, the set of correct results that should be reached on prisoners' claims. Those shadow standards would function only in habeas corpus and, in this context, would mark the limits of just *how* wrong the state courts can be without triggering corrective federal action.

There is no analogy to cases in which state executive officers are permitted to assert a "good faith" defense to suits for damages. Judges are professionals, charged to make judicial decisions about rights. They are used to being reviewed by other courts. Executive officers are allowed a "good faith" defense to actions for damages in order that the threat of personal liability will not deter them from seeking public jobs or performing their duties properly. State judges do not expose themselves to personal liability when they decide cases and thus require no similar protection.

Nor is there any analogy to cases in which the federal courts defer to administrative agency interpretations

of the statutes they administer. Agency judgments receive deference because of agency accountability, expertise, and capacity, or because Congress has prescribed that their decisions should be respected. The state courts have no special expertise or capabilities in constitutional adjudication. Moreover, Congress has expressed no intent to assign them responsibility for federal claims. Rather, Congress has conferred jurisdiction on the federal courts to adjudicate federal claims afresh -- independently applying legal standards to the facts.²

ARGUMENT

I. A FEDERAL HABEAS CORPUS COURT SHOULD NOT DEFER TO A STATE COURT'S APPLICATION OF LAW TO FACT

A. The Habeas Corpus Statutes Require The Federal Courts To Make *De Novo* Determinations Of Prisoners' Legal Claims

The question on which the Court has called for briefs is controlled by explicit jurisdictional statutes, consistently construed by this Court to mean that the federal courts must exercise *de novo* judgment on the application of law to the facts of specific cases. If this clearly established aspect of federal jurisdiction is to be changed, it is Congress, not this Court, which must act.

The federal courts have had jurisdiction to issue the writ of habeas corpus since the first Judiciary Act of 1789, 1 Stat. 81-82. Their authority to issue the writ on behalf of prisoners in state custody dates from Reconstruction. Immediately following the Civil War, Con-

² To avoid duplication, we adopt by reference the argument set forth in the *amicus* brief of the American Bar Association that neither *Teague v. Lane*, 489 U.S. 288 (1989), nor any of its progeny, affect the jurisdiction of the federal courts to apply their independent judgment to appropriately raised legal claims in habeas proceedings.

gress promulgated the Fourteenth Amendment and enacted a series of civil rights laws to protect individuals against state, rather than national, governmental power. Simultaneously, Congress created new procedural mechanisms for the enforcement of the new substantive rights. Habeas corpus for prisoners in state custody, established by the Habeas Corpus Act of 1867, 14 Stat. 385, was one such mechanism. Taken together, those Reconstruction enactments effected a "vast transformation from the concepts of federalism that had prevailed in the late 18th century." Cf. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

The fundamental purpose of habeas corpus for state prisoners, civil rights actions for violations of the Constitution under color of state law, and other new procedures and jurisdictional provisions, was self-evident:

Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; *it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.*

Id. (emphasis added).

When the habeas corpus bill was introduced in the House of Representatives, the floor manager, Rep. William Lawrence of Ohio, explained that it would enable the federal courts to "enforce the liberty of all persons" and that it would establish power in the federal courts "coextensive with all the powers that can be conferred on them." Cong. Globe, 39th Cong., 1st Sess. 4151 (1866). In the Senate, Senator Lyman Trumbull explained that the bill would fill a gap in the habeas jurisdiction that had existed since 1789. Under the original act, the fed-

eral courts could receive petitions only from prisoners held in federal custody; under the new law, the federal courts would be able to entertain applications from state prisoners, provided they attacked their custody as in violation of federal law. Cong. Globe, 39th Cong., 1st Sess. 4229 (1866).³

This Court promptly said that the 1867 Act was of "the most comprehensive character . . . and that [i]t is impossible to widen this jurisdiction." *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1869).

The language of the 1867 Act construed in *McCardle* has not changed in more than a century:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions

(c) The writ of habeas corpus shall not extend to a prisoner unless --

3) He is in custody in violation of the Constitution or laws or treaties of the United States

28 U.S.C. §2241.

Nearly forty years ago, in *Brown v. Allen*, 344 U.S. 443, Justice Reed's opinion for the Court read the same statutory language⁴ to require independent federal adju-

³ It has been suggested that the 1867 Act had a more limited purpose. Mayers, "The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian," 33 U.Chi.L.Rev. 31 (1965). That thesis will not withstand scrutiny. See Yackle, "Form and Function in the Administration of Justice: The Bill of Rights and Federal Habeas Corpus," 23 U.Mich. J.L.Ref. 685, 695-700 (1990).

⁴ Just prior to *Brown*, Congress had codified the so-called "exhaustion doctrine," which generally requires state prisoners to present their fed- (continued...)

dication of prisoners' federal claims, notwithstanding previous state judgments:

[T]he state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort in another jurisdiction on federal constitutional issues. It is not *res judicata*.

Id. at 458.

This passage from Justice Reed's opinion has always been read to answer the question now before the Court:

Brown v. Allen squarely established . . . that federal constitutional questions litigated fully and fairly in state criminal cases are subject to collateral review on habeas corpus Insofar as Justice Reed's ambiguous language casts doubts on this proposition, the point is definitively established by his exhaustive review of the merits of *Brown's* constitutional claims, and by Justice Frankfurter's opinion in the case.⁵

Justice Frankfurter's opinion, joined by a majority of the Court in *Brown*, explicitly interpreted the statute to require the federal courts to exercise *de novo* judgment

⁴ (...continued)

eral claims to the state courts before applying for a federal writ of habeas corpus. See *Ex parte Royall*, 117 U.S. 241 (1886). The amendment in 1948 included only what are now subsections (b) and (c) of §2254. The substantive language that now appears in subsection (a) was not enacted until 1966. In *Brown*, then, the Court dealt only with the language in the original 1867 Act, §2241. The later addition of §2254(a), after both *Brown* and the Court's decisions in 1963, constitutes a congressional enactment of *Brown's* authoritative construction of the original Act.

⁵ P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1487 & n.1 (3d ed. 1988).

regarding the application of law to fact:

Where the ascertainment of the historical facts does not dispose of the claim but calls for *interpretation of the legal significance of such facts . . .* the District Judge *must exercise his own judgment on this blend of facts and their legal duties. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge . . .*

344 U.S. at 507-08 (opinion of Frankfurter, J.)(emphasis added).

In the immediate wake of *Brown*, the Court confirmed this interpretation. *E.g., Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Sanders v. United States*, 373 U.S. 1 (1963).⁶ The same interpretation has been repeated in cases in which the Court has identified nonfederal or procedural grounds for withholding federal judgment on the merits. The Court has taken pains to make clear that, if the merits were open for consideration, the federal courts would make their own, independent decisions:

[T]he federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the U.S. Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in state proceedings.

⁶ Even Justice Harlan, who dissented in *Noia*, *Townsend*, and *Sanders*, recognized that, under *Brown*, when the merits were not procedurally foreclosed, a federal habeas court "had the right and duty to satisfy itself of the correctness of the state decision." *Noia*, 372 U.S. at 461 (emphasis added).

Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

Congress, too, has reaffirmed *Brown*. In 1966, Congress added the following new subsection to §2254 of the habeas chapter:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

In this new language, Congress codified yet again the federal courts' authority to make independent judgments on state prisoners' federal claims notwithstanding previous judgments in state court.⁷

B. The Responsibility Under The Constitution To Prescribe The Federal Courts' Jurisdiction Is Committed To Congress

Controlling habeas corpus statutes require the federal courts to make their own independent determinations

⁷ Other amendments in 1966 are to the same effect. In a new subsection (d) added to §2254, for example, Congress established a presumption in favor of state findings of basic fact found after adequate state court hearings. The clear implication was that state court conclusions regarding legal issues, or the application of legal standards to primary facts, would not be entitled to similar deference in federal court. *Miller v. Fenton*, 474 U.S. 104 (1985)(holding that the voluntariness of a confession is a mixed question of law and fact to which the statutory presumption for findings of basic fact is inapplicable); *Sumner v. Mata*, 455 U.S. 591, 597 (1982)(confirming that the "ultimate question" of a prisoner's entitlement to relief on a claim is not a question of basic fact under the statute). See also 28 U.S.C. §2244(b)-(c) (establishing deference rules for prior federal court judgments on claims and thus recognizing that previous state court judgments are not entitled to deference).

of the legal claims raised by state prisoners. The *de novo* application of relevant legal rules to the basic facts of particular cases constitutes the principle element of that adjudicative function. Accordingly, the Court is not free to decide that the federal courts should defer to state applications of law to fact. To do so would violate Congress' authority to prescribe the federal courts' jurisdiction under Article III of the United States Constitution. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850).

In this instance, Congress has acted to ensure that individual rights are protected by independent federal courts. If the Court fails to give effect to the majority will reflected in that political judgment, it will not be checking a threat to individual liberty posed by majoritarian power but, instead, will be frustrating the authority of the legislative branch to *safeguard* individual rights by according those rights effective, independent tribunals for their determination.

The Commonwealth of Virginia and the *amici* supporting reversal in this case baldly ask the Court itself to establish a radically different standard of review for the federal courts in habeas cases -- as though the scope of the habeas jurisdiction were not controlled by statute. Astonishingly, the Court is invited simply to ignore the decisions that Congress has reached within its constitutional authority. It is as though there were no statute or, indeed, as though there were no Congress.

The Department of Justice and many of the state attorneys general who appear as *amici* in this case have long pressed Congress to limit, or even to eliminate, habeas corpus for state prisoners. Introducing a bill to the Senate more than ten years ago, Attorney General Smith declared:

[T]here is no justification in the present day for the availability of federal habeas corpus as a routine means of review of state crimi-

nal convictions

[Habeas corpus should only be a] backstop or fail-safe mechanism to guard against the rare instances in which state courts may have acted in defiance or disregard of federal law.

Letter from William French Smith to George Bush, President of the U.S. Senate, March 3, 1982, *cited in* Yackle, "The Reagan Administration's Habeas Corpus Proposals," 68 Iowa L.Rev. 609, 614 (1983).

Among other things, the bill Mr. Smith urged on Congress would have barred the federal courts from awarding relief on any claim that had previously been "fully and fairly adjudicated" in state court. S.2216, 97th Cong., 2d Sess. §5 (1982).⁸ The Attorney General was perfectly candid regarding the purpose of this "full-and-fair-adjudication" standard. He said the intent was to "repeal" the federal courts' authority to review the "legal and mixed legal-factual determinations of State courts." 128 Cong. Rec. S265 (Feb. 2, 1982).

Congress declined to make any such radical changes in the federal courts' habeas jurisdiction. Nevertheless, the Justice Department has continued its relentless pursuit of new legislation that would force the federal courts to defer to the state courts on law-application issues.⁹ In

⁸ See The Habeas Corpus Reform Act of 1982: Hearings on S.2216 Before the Committee on the Judiciary, 97th Cong., 2d Sess. (1982).

⁹ Occasionally, strategists in the Department have taken an even more radical position:

Attorney General Smith suggested that the optimum solution to the problems of federal habeas corpus jurisdiction would be the enactment of legislation abolishing federal habeas corpus as a post-conviction remedy for state prisoners. We agree.

(continued...)

each of the last three Congresses, the Justice Department has pressed the same "full-and-fair-adjudication" program on the legislative branch. Always the objective has been the same: to restrict the federal courts' authority independently to apply federal law to the facts of particular cases. In a commentary accompanying the current version of the plan, the Department states flatly that the purpose of the "full-and-fair-adjudication" standard is to overrule *Brown v. Allen*, 344 U.S. 443, and to substitute "a more limited standard of review."⁹

Some state attorneys general have also lobbied Congress for similar legislation, and joined the Justice Department to testify before congressional committees on behalf of measures that would have the federal courts defer to state court judgments. For example, Attorney General Lungren of California recently had this to say to the Senate:

[W]e are concerned with reforming the *statutory* [emphasis in original] writ of habeas corpus, a non-constitutional post-conviction remedy that has been *created by Congress* and expanded through judicial construction. Therefore, *only the Congress* can repair the problems of delay and lack of finality which

⁹ (...continued)

U.S. Department of Justice, Office of Legal Policy, Report to the Attorney General, Federal Habeas Corpus Review of State Judgments vi (1988)(emphasis added).

¹⁰ U.S. Department of Justice, The Comprehensive Violent Crime Control Act of 1991: A Summary 25 (1991). Before congressional committees, representatives of the Department have urged Congress to establish "an appropriate standard of deference to state court legal rulings *and the application of law to fact*." Hearings on H.R.1400 Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 102d Cong., 1st Sess. 7 (1991)(typescript statement of Andrew McBride, Associate Deputy Attorney General) (emphasis added).

we are experiencing under our habeas corpus process

Hearings on S.635 Before the Committee on the Judiciary, 102d Cong., 1st Sess. 9 (1991)(typescript statement) (emphasis added).

There is nothing illegitimate in any of these approaches to Congress. The Justice Department and state attorneys general are entitled to recommend legislation -- as are all Americans. Yet the Court cannot blink reality. Numerous legislative battles have been fought over habeas corpus policy, and, indeed, continue to be fought this spring. Thus far, those who have sought a rule of deference to the state courts have been unsuccessful. Accordingly, political losers have simply crossed the street in hopes that this Court will give them the victory they could not achieve in the legislative branch.¹¹

In effect, Virginia and other *amici* want the Court to substitute its own policy prescription for that of Congress and thus to challenge Congress to reassert its authority by reconfirming the federal courts' authority in habeas corpus -- this time by enough votes to override a presidential veto.¹² Time and again in recent years, this Court

¹¹ During the Nixon Administration, the Justice Department urged the Judicial Conference Subcommittee on Habeas Corpus to consider three alternative plans in 1971, one of which was explicitly presented as overruling *Brown v. Allen*. Recognizing the need for legislative action, however, the Department did not ask this Court itself to jettison *Brown*. See generally Remington, "State Prisoner Access to Postconviction Relief -- A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts," 44 Ohio St.L.J. 287, 293 (1983) (referring to correspondence from William H. Rehnquist, then Assistant Attorney General). Instead, several years later, the Justice Department supported legislation that would have restricted federal habeas corpus to claims going to the "reliability of the factfinding process." S.567, 93d Cong., 1st Sess. (1976).

¹² Many of the state attorneys general who appear as *amici* here have (continued...)

has made it crystal clear that it will not permit itself to be used in this way. Even if the Court doubts the wisdom of the course Congress has chosen, the Court is duty-bound to respect political judgments duly reached by the legislative branch. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978).¹³

Particularly in cases in which this Court has given a federal statute an authoritative interpretation, and Congress has had ample time and opportunity to reject that interpretation if it chooses, this Court has always been unwilling itself to make a change that Congress has failed to make. As Justice Kennedy said for the Court in *Hilton v. South Carolina Public Railways Commission*, ___ U.S. ___, 112 S.Ct. 560, 564 (1991)(citations omitted):

'Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done'

Congress has had almost 30 years in which it could have corrected our decision in *Parden* if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding.

¹² (...continued)

urged the President to veto the pending crime bill on this basis. The President has threatened such a veto. N.Y. Times, Nov. 27, 1991, at A1.

¹³ Only a few weeks ago, Justice Thomas' opinion for a unanimous Court in *Molozof v. United States*, ___ U.S. ___, 112 S.Ct. 711, 715 (1992), rejected the Government's reading of a federal statute, because it was "contrary to the statutory language." Cf. *Bob Jones University v. United States*, 462 U.S. 574, 622 (1983)(Rehnquist, J., dissenting)(stating that the Court should not "legislate for Congress")(emphasis added).

One could scarcely find a case closer to *Hilton* on this point than the present case. Here, as in *Hilton*, the Court has previously interpreted a federal statute in a way that has proved to be controversial in some quarters; here, as in *Hilton*, Congress has had decades to change the law. Yet Congress has *not* overruled *Brown v. Allen* legislatively, and this Court cannot jettison that authoritative interpretation of the habeas statutes without doing violence to the separation of powers.

In fact, Congress has constantly debated proposals to overhaul habeas corpus. The decision in *Brown* has always been featured prominently in those debates. When federal statute law has "seen careful, intense, and sustained congressional attention," any change in existing law "must come from Congress, rather than from this Court." *Square D. Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 424 (1986).¹⁴

It is inconceivable that this Court would now frustrate a congressional policy so ancient, so hard-fought, and so many times reaffirmed. There is only one appropriate answer to the question now at bar. Congress has decided that the federal courts will apply the law to the facts of particular cases, and this Court must respect that decision.

II. INDEPENDENT REVIEW IN FEDERAL HABEAS CORPUS IS AN ESSENTIAL ELEMENT OF THE MACHINERY OF AMERICAN JUSTICE

There is a reason why Congress has long provided for independent federal jurisdiction in habeas corpus.

¹⁴ There is nothing new in this. When Congress reenacts a statute after considering existing interpretations of it "in great detail," the Court has always concluded that Congress means to embrace those interpretations. *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951). In this instance, Congress clearly assumed the continued force of *Brown* when it wrote the 1966 amendments to the habeas statutes.

De novo adjudication in federal court is a theoretically sound and effective element of the machinery of American justice.

Many of the provisions of the Bill of Rights are procedural safeguards in criminal cases; most criminal prosecutions are conducted in state court. If the Bill of Rights is to receive an authoritative, uniform interpretation, either this Court must sit as a court of error for fifty different state judicial systems, or there must be some alternative means by which the state courts and the lower federal courts can winnow the crop of cases competing for attention. The first of these is infeasible; the second is federal habeas corpus.¹⁵

The current system sensibly allocates responsibility between the state and federal courts in a manner that either achieves substantial agreement on federal questions or lays the predicate for this Court to settle important divisions of opinion. In the main, initial fact-finding is assigned to the state courts.¹⁶ Inasmuch as the exhaustion doctrine requires prisoners to present their federal claims in state court, by the time a case reaches federal habeas corpus the state courts usually have held hearings, taken testimony, and established a reliable factual record on which legal judgment can rest.

By contrast, the federal courts rightly exercise fresh judgment regarding the legal significance of the factual

¹⁵ It is partly because the federal habeas courts can correct state court errors of federal law that Congress has found it unnecessary to establish routine removal jurisdiction for the initial trial of state criminal cases in the federal forum. Cf. Mishkin, "The Federal Question in the District Courts," 53 Colum.L.Rev. 157, 172 n.70 (1953). Moreover, the availability of habeas corpus in the district courts has become all the more important with the elimination of most of this Court's obligatory appellate jurisdiction. Review of Cases by the Supreme Court, Pub.L. 100-352, 102 Stat. 662 (1988).

¹⁶ 28 U.S.C. §2254(d).

record. While they can, do, and should take account of the state courts' determinations of legal issues and "mixed" questions of law and fact, they have authority to make their own, independent assessments.

For decades now, the writ has been the principal means by which the federal courts enforce the Bill of Rights in state criminal cases. Almost seventy years ago, in *Moore v. Dempsey*, 261 U.S. 86 (1923), the Court rejected Justice McReynolds' argument that the conviction of five black farmers must be sustained because the Arkansas courts had decided that their trial had been sufficient. The decision in *Moore* was written by Justice Holmes and echoed his dissent in *Frank v. Mangum*, 237 U.S. 309, 346 (1915), one of the most egregious cases of antisemitism in American history:

[H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry into whether they have been more than an empty shell.

The adoption of a rule requiring the federal courts to defer to state court applications of law to fact would break faith with a hallowed American tradition in which Article III courts have long safeguarded citizens' federal rights. The issue before the Court is no dry question of efficient judicial process in the federal system, no neutral matter of comity and respect for state court judgments. It goes to the structural role of the federal courts in the protection of individual liberty in a post-Reconstruction world in which the Constitution has undergone fundamental transmutation and now limits state, as well as national, governmental power. This question is basic. On its resolution turns Congress' ability to ensure the availability of federal remedies for federal rights.

III. ALTERNATIVES TO *DE NOVO* REVIEW WOULD BE EITHER UNWORKABLE OR INAPPROPRIATE

A. The Effects Of A Deference Rule

A rule requiring the federal courts to defer to state court judgments applying law to facts would have one of two effects. Either it would effectively eliminate federal habeas corpus as a substantive check on the validity of state prisoners' custody, or it would saddle the federal courts with burdensome duties of questionable value -- adding to, rather than mitigating, the very problems that such a rule would presumably be meant to solve.

In most instances, the application of law to primary facts constitutes the core of the judicial function. By comparison, the identification of the abstract legal principles applicable to a case, important as it may be, is typically a relatively simple matter -- guided by this Court's precedents. Accordingly, in order to perform as the independent courts they are, the federal courts in habeas corpus are rightly expected to exercise independent judgment regarding the application of relevant legal standards.

Under any deference standard the Court might select, the federal courts would understand that their role is to be fundamentally different from what it is now. Told to deny federal relief even when they believe a prisoner's claim to be meritorious, the federal courts would have to distinguish between error that is sufficiently mild to be ignored and error that is sufficiently grave to warrant federal correction. Despite attempts to locate some middle ground between considering claims *de novo* and giving state judgments preclusive effect, a slide to the latter extreme is entirely predictable.¹⁷

¹⁷ To paraphrase Justice Scalia in another context, the federal courts
(continued...)

Experience in the wake of *Stone v. Powell*, 428 U.S. 465 (1976), provides a telling illustration. The Court held in *Stone* that the federal courts should not award relief on the basis of the Fourth Amendment exclusionary rule, unless the state courts failed to give the prisoner an adequate opportunity to litigate such a claim. The district courts have consistently understood *Stone* to mean that they should not ordinarily reexamine state applications of the Fourth Amendment to the behavior of the police in particular cases. The result is that federal enforcement of the exclusionary rule in habeas corpus is now a dead letter. The only remaining federal forum for search-and-seizure claims by state prisoners is in this Court on direct review.

Of course, it is well settled that *Stone* elaborated on the exclusionary rule, rather than the district courts' jurisdiction in habeas corpus. *Stone*, 428 U.S. at 494-95 n.37.¹⁸ Nevertheless, the lesson to be drawn from that case is pertinent here. If this Court reinterprets the ha-

¹⁷ (...continued)

might be concerned lest the term "deference" standing alone should come to mean very little -- a "mealy-mouthed" word used to suggest that a previous judgment is examined "with attentiveness and profound respect" when, in fact, it is being ignored. Scalia, "Judicial Deference to Administrative Interpretations of Law," 1989 Duke L.J. 511, 516. To guard against that result, the federal courts might overcompensate and give a previous judgment *binding*, i.e., preclusive, effect. If the Court decides in this case that the federal courts are to defer to state court judgments on *some* standard, the Court must recognize that the likely result will be the end of any serious federal adjudication at all.

¹⁸ Since the Court has concluded that the enforcement of the exclusionary rule in habeas corpus would not significantly deter police misconduct in the field, *Stone* simply instructs the district courts not to invoke that rule in habeas. See *Allen v. McCurry*, 449 U.S. 90, 98 (1980). Despite arguments that a similar analysis should be applied to other judge-made rules or constitutional claims, the Court has held *Stone* to its narrow, exclusionary rule context -- for the very reason that an extension would be irreconcilable with the controlling statute. *Rose v. Mitchell*, 443 U.S. 545 (1979).

habeas corpus statutes to require the federal courts to defer to state court applications of law to fact with respect to *all* claims, federal habeas corpus for state prisoners may effectively be at an end. This is not hyperbole. It is a candid observation grounded in recent experience.¹⁹

The application of a deference rule in this very case would generate yet another illustration. Respondent's federal claim is that the evidence against him at trial was insufficient under this Court's decision in *Jackson v. Virginia*, 443 U.S. 307. Under *Jackson*, no court (state or federal) is warranted in upsetting a jury's decision, unless "viewing the evidence in the light most favorable to the prosecution," the court concludes that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. Accordingly, when respondent raised his claim in the state courts of Virginia, those courts were obliged by the terms of the claim itself to defer to any jury verdict within reason.

If the federal courts were, in turn, instructed to defer to "reasonable" state court judgments, the result would be difficult to defend as sensible law. A federal court would be able to award relief only if it concluded that the state courts acted unreasonably in concluding that the jury acted reasonably in deciding that there was no reasonable doubt regarding the prisoner's guilt. It

¹⁹ The Solicitor General insists that the state courts are able to enforce the exclusionary rule and that the oversight previously provided by the federal habeas courts may actually have created a perverse incentive in the state courts to relax their vigilance. Brief for the United States at 16. Neither evidence nor logic supports that hypothesis. If anything, the ability of prisoners to seek relief on exclusionary rule claims prior to *Stone* presumably encouraged the state courts to respect Fourth Amendment rights in order to protect their judgments. In *Stone* itself, of course, the Court recognized that *some* deterrent impact might be gained by enforcing the exclusionary rule in habeas, but concluded that that *positive* incentive was outweighed by the costs.

would be patently absurd to bury federal rights under the weight of multiple checks for "reasonable" error. Both the judicial system and the rights that system is meant to protect would be done a disservice.²⁰

The implications of a deference rule would be no less troubling in the unlikely event the federal courts *were* able to stake out a middle ground between *de novo* adjudication and preclusion. Under any review standard, the district courts would continue to receive petitions, study the relevant materials, resolve procedural issues, and make judgments. Habeas corpus for state prisoners would look largely the same as it does now. It would not be the same, however, in that the federal courts would no longer invest resources in the identification and cure of constitutional error. Instead, they would elaborate a shadow set of standards that track with, but do not match, the set of correct results that should be reached on prisoners' federal claims. Those shadow standards would function only in habeas corpus and, in this context, would mark the limits of just *how* wrong the state courts can be without triggering corrective federal action.²¹

²⁰ Cf. *Dewsnup v. Timm*, ___ U.S. ___, 112 S.Ct. 773, 783 (1992) (Scalia, J., dissenting) (urging the Court to "avoid construing [a] statute in a way that produces . . . absurd results"). A similar result might follow from the adoption of a standard barring federal relief on a claim that was "fully and fairly adjudicated" in state court. After all, "full and fair adjudication" is the standard associated with preclusion under the full faith and credit statute. 28 U.S.C. § 1738. *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982). Habeas has always been an express statutory exception to § 1738. *Id.* at 485 n.27; accord *Allen v. McCurry*, 449 U.S. at 98 n.12 (1980).

²¹ Cf. *Molzof v. United States*, 112 S.Ct. at 717 (rejecting the Government's reading of a statute because it would be "difficult and impractical to apply"). It is ludicrous for Virginia to propose that, by telling the federal habeas courts to defer to "reasonable" state judgments, the Court would be establishing an easily applied "bright line" test. Brief

(continued...)

Either way, moreover, if the federal courts were instructed to defer to state court applications of law to fact, they would find themselves searching petitions for evidence of a state court's willful refusal to respect constitutional rights. Everyone who has studied these problems hopes and believes that cases of that kind are extremely rare. A head of federal jurisdiction that is maintained only to search out such cases would be offensive to the state courts by its very existence. Some state judges may think that their judgments should not be subject to reexamination in federal habeas. Yet all judges are familiar with some manner of review for error. A system whose only reason for being is to catch unreasonable and abusive state decisions is quite another matter. One can scarcely think of a framework more likely to generate friction.

B. The Analogy To Suits For Damages

Some observers suggest that the federal courts should defer to "reasonable" or "good faith" state court applications of law to fact by analogy to cases in which state executive officers are permitted to assert a "good faith" defense in civil suits for damages. That argument is seriously misconceived.

There is no comparison between the ability of state judges to know and correctly apply the Constitution and

²¹ (...continued)

for Petitioner at 22. A "reasonableness" standard would be an administrative nightmare for the district courts, generating a rash of conflicting precedents in indistinguishable cases. A core element of federal justice -- uniformity in the articulation and enforcement of constitutional rights -- would be sacrificed. That, in turn, would break faith with the common understanding that the Bill of Rights establishes a consistent shield for liberty that cannot be permeated by regional prejudice. It is no answer that this Court would retain jurisdiction to review state and federal habeas corpus judgments directly. *Certiorari* review here is impractical in all but a handful of cases.

the capacity of executive officers to assess whether their behavior in the field comports with federal law. Judges are judges: professionals educated in the law, prepared and equipped to preside over legal proceedings, to take evidence, to hear argument, and to make careful judgments in light of available legal materials. Executive officers, by contrast, are typically nonprofessional agents, trained to follow departmental rules and practices, but unable to duplicate the deliberations that inform judicial proceedings.

The Court has often articulated its reasons for recognizing a "good faith" defense on the part of state executive officers sued for damages. See *Anderson v. Creighton*, 483 U.S. 635 (1987). Principally, the Court has been concerned that the threat of personal liability for actions taken in the line of duty may deter qualified men and women from seeking public jobs or performing their duties properly. Those reasons simply do not obtain with respect to erroneous, but "good faith," state court judgments on federal claims, which involve no personal exposure for the state judges concerned.²²

One court's examination of the legal conclusions reached by another is a familiar feature of American justice. All judges occasionally make mistakes, and when they do their judgments may be upset; they expect this and should not take personal offense when it happens. While this Court properly takes potential friction between the federal and state courts into account in fashioning standards for the exercise of federal judicial power, the Court cannot restrict the scope of federal jurisdiction to accommodate outsized state court sensitivities -- even if they can be shown to exist.

²² This distinction is implicit in the Court's holding that judges are absolutely immune from suits for money damages, *Pierson v. Ray*, 386 U.S. 547 (1967), but may be sued for declaratory and injunctive relief, *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980).

C. The Analogy To Judicial Review Of Administrative Action

Nor is there any fair analogy between the question here and the deference the federal courts routinely give to federal agencies' interpretations of the statutes they administer and the application of those statutes to particular fact patterns.

The Court has held that in cases in which there is ambiguity, the federal courts should accept agency determinations that are "reasonable" or "permissible" in light of the federal statute under examination. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 838 (1984); Scalia, *supra* at 512. The reasons for that deference occur on two levels. First, agency judgments have been thought to be entitled to deference because of administrative agencies' political accountability, expertise, and ability to orchestrate complicated regulatory schemes. Second, agency judgments have been accorded deference to give effect to congressional intent. Scalia, *supra*.

Those reasons do not obtain with respect to state court determinations of federal constitutional claims. The state courts have no special expertise or capabilities in constitutional adjudication. If any courts have a comparative advantage in this respect, it is the independent courts established under Article III. Moreover, Congress has expressed no intent to assign responsibility for constitutional cases to the state courts. As explained above, Congress has conferred jurisdiction on the federal habeas courts to adjudicate federal claims afresh -- independently applying legal standards to the facts of individual cases.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

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QUESTION PRESENTED

In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

No. 91-542

ELLIS B. WRIGHT, JR., WARDEN, *et al.*,
Petitioner,

vs.

FRANK ROBERT WEST, JR.,
Respondent.

INTEREST OF AMICUS CURIAE¹

The American Bar Association ("ABA") is a voluntary membership organization of the legal profession dedicated to the promotion of a fair and effective system for the administration of justice. *See* ABA Const., art. 1, § 1.2. During the past decade, that dedication has led the ABA to make habeas corpus one of its highest priorities. In 1982, the Association adopted a comprehensive policy urging specific reforms in federal and state postconviction procedures. In 1983 and 1991, the ABA provided testimony and written materials to both Houses of Congress considering reform of the habeas corpus statutes.

The ABA has been particularly concerned with the administration of justice in habeas corpus proceedings brought by prisoners sentenced to death in state courts. In 1989, under a grant from the State Justice Institute, an ABA task force conducted an intensive study of death penalty habeas corpus reform. Based upon the task force's report and recommendations, the ABA in 1990 adopted, by overwhelming vote, a comprehensive policy statement

¹ Letters from all parties consenting to the filing of this brief have been filed with the Clerk.

which urged legislative reform of habeas corpus procedures, both state and federal, to make them more efficient and better able to address the merits of the fundamental claims many postconviction petitions raise. No organization in this country is more aware of the need for reform of habeas corpus procedures than the ABA, and none has worked harder during the past decade to achieve that reform.

SUMMARY OF ARGUMENT

The issue posed by the Court is not one of constitutional law or judicial administration, which this Court can settle as it deems best. It is Congress, not this Court, that defines both the jurisdiction of the federal courts in habeas proceedings and the nature of the review to be exercised in those proceedings. This crucial point is overlooked by both the petitioners and the Solicitor General, who do not even assess the most relevant materials in answering the question posed: *Congress'* pronouncements on habeas corpus. To vary a well-known maxim, it is, after all, a *statute* we are expounding. Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

Congress has been extraordinarily consistent on the question posed by the Court. Whenever it has granted federal rights to prisoners in state custody, Congress has given federal courts plenary power, in habeas proceedings, to re-examine independently the substance of state court decisions to ensure that those federal rights were respected. Decisions applying the Habeas Corpus Acts of 1833 and 1842 confirm that when federal courts were authorized to entertain habeas petitions from state prisoners, they paid no deference at all to the underlying state-court determinations. When the Civil War amendments enlarged the federal rights of state prisoners, Congress promptly in 1867 expanded the federal courts' habeas jurisdiction to protect these new federal rights. Given the Reconstruction Congress' undeniable preference for a federal forum to enforce the newly granted federal rights, it would be remarkable indeed if Congress had intended federal courts

to defer to state courts' interpretations or applications of federal law.

In *Brown v. Allen*, 344 U.S. 443 (1953), this Court made explicit what the federal courts had understood for decades: when adjudicating cases under the 1867 habeas corpus statute, federal courts were to exercise independent, plenary review of state-court conclusions of federal law and mixed questions of law and fact. While *Brown* spawned academic debate, its affirmation of the standard of review called for by Congress the 1867 Act has been accepted and followed for almost forty years.

Since *Brown*, Congress has considered reforming the habeas system at least 21 times and has twice enacted substantive amendments. Well aware of *Brown's* interpretation of the 1867 Act, Congress has explicitly considered, and rejected, legislation designed to overrule the standard of independent review. In short, the Solicitor General and other *amici* supporting petitioners are attempting to get this Court to do something they have been unable to convince the democratically elected Congress to do. It would be an aggressive exercise of judicial power for the Court to reinterpret the 1867 Act today simply because it believes that the policies of habeas corpus might thereby be better served. Considerations of *stare decisis* apply most strongly in this statutory context, for if *Brown* was wrong, Congress could have—and still can—correct it.

Contrary to the arguments of the petitioners and the Solicitor General, this Court's recent decisions have not changed the independent review standard. *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny merely establish that new rules of constitutional law announced after a conviction becomes final should not be applied in federal habeas proceedings. Far from requiring federal courts to defer to state courts' interpretations of settled constitutional law so long as they are merely "reasonable," *Teague* insists that, once it is determined what the law was at the time of the state-court decision, federal courts must ensure that that law be applied faithfully. Since deciding *Teague*, this

Court has continued to apply independent, plenary review under the 1867 Act to state-court applications of federal constitutional law.

Indeed, after *Teague*, there remains no federalism-based reason to defer to state-court applications of constitutional law. Before *Teague*, state courts were often reversed on habeas for failing to anticipate this Court's evolving views about due process. Now, decisions of state courts are reviewed only to determine if they were correct at the time they were rendered. If state courts are truly co-equal, there is no reason for federal courts to defer to them when they were wrong at the time of decision, even if they were only "reasonably" wrong. Moreover, adding a rule of deference after *Teague* would gratuitously undercut three of the most important functions of federal habeas review: (1) "to determine that the conviction rests upon correct application of the law in effect at the time of the conviction;" (2) "to force trial and appellate courts . . . to toe the constitutional mark," *Solem v. Stumes*, 465 U.S. 638, 653 (1984) (Powell, J. concurring); and (3) to ensure that the Constitution is applied equally in all jurisdictions.

The primary reason Congress has never strayed from independent, plenary review is undoubtedly the crucial role that review has played in safeguarding constitutional rights. Recent studies reveal that in four out of every ten capital cases in which the state courts have found no constitutional defect, federal courts, exercising plenary, independent review, have been compelled to grant the writ because of constitutional error. It is impossible to imagine how that record could recommend deference.

It is fundamentally wrong to ask federal judges to affirm incorrect but "reasonable" decisions of state courts. A federal judge who concludes that settled constitutional rights were violated should not then ask himself whether the state court's mistake in rejecting the claim was "reasonable." Affirming rulings which, however reasonable, incorrectly apply the Constitution accords with neither the judicial oath to uphold the Constitution nor the congress-

sional mandate to "entertain" all claims that a prisoner is being restrained in violation of his constitutional rights.

ARGUMENT

Introduction

In November 1919 five black men were sentenced to death following a forty-five minute trial in an Arkansas courtroom inflamed by community passion. The state supreme court answered the defendants' claim they had been denied a fair trial by stating "'that it could not say 'that this must necessarily have been the case;' that eminent counsel was appointed to defend the petitioners, that the trial was had according to law, the jury correctly charged, and the testimony legally sufficient.'" *Moore v. Dempsey*, 261 U.S. 86, 91 (1923). The federal district court refused to consider a petition for writ of habeas corpus, on the grounds that the Arkansas state courts had considered the petitioners' due process claims.

On appeal this Court reversed. Speaking for the Court, Justice Holmes stated "that it does not seem to us sufficient to allow a judge of the United States to escape the duty" of independently evaluating the constitutional significance of the facts "when, if true, as alleged, they make the trial absolutely void." *Id.* at 92. Thus were the lives of five men saved, and the importance of independent federal habeas review of the application of constitutional law underscored—as it has been so many times in our nation's history.

The facts of the case now before the Court pale in comparison to *Moore v. Dempsey*, but the question posed by this Court raises the same fundamental question answered 69 years ago by Justice Holmes. The ABA urges this Court to adhere to the answer it has consistently given in the past: In determining whether to grant a petition for a writ of habeas corpus by a person in state custody, a federal court must exercise plenary, independent review of all questions of federal constitutional law properly pre-

sented. This is the standard of review that has been dictated by Congress, and applied by this Court, since 1789.

This standard of review must apply regardless of whether the constitutional issues raised are "pure" questions of law or "mixed" questions of law and fact. In the latter, the federal court defers to state-court findings of fact, as required by Congress in 28 U.S.C. § 2254(d). But on the application of federal constitutional principles to those facts, the federal court must exercise independent judgment upon plenary review. See, e.g., *Sumner v. Mata*, 449 U.S. 539, 543-44 (1981). The court must consider the views of "a coequal state judiciary", *Miller v. Fenton*, 474 U.S. 104, 112 (1985), but it cannot "defer" to those views simply because they are "reasonable" and resulted from a "full and fair" hearing. As Justice Frankfurter explained in *Brown v. Allen*, 344 U.S. at 508 (emphasis added), Congress demands more:

Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of [constitutional] issues, no binding weight is to be attached to the State determination. *The congressional requirement is greater.* The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.

I. In Habeas Proceedings Involving State Prisoners, Congress Has Mandated Plenary, Independent Review of All Constitutional Questions Properly Presented.

The Great Writ of habeas corpus, whose protections were "[c]onsidered by the Founders as the highest safeguard of liberty," *Smith v. Bennett*, 365 U.S. 708, 712 (1961), is "provided for, in the most ample manner" in the United States Constitution, *The Federalist* No. 83, at 543 (Luce ed. 1976). Article I, section 9 guarantees against suspension of "[t]he Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it."

Yet the power of federal courts to issue the writ is neither inherent nor dictated by the Constitution. Rather, it is a power which Congress must confer by statute. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). And except to insist that "the writ of *habeas corpus* is the precious safeguard of personal liberty and [that] there is no higher duty than to maintain it unimpaired," *Bowen v. Johnston*, 306 U.S. 19, 26 (1939), this Court has generally left to Congress the implementation of the Suspension Clause's requirement that the writ be preserved. This is consistent with the constitutional scheme: significantly, the Suspension Clause is included in article I, prescribing the powers of Congress, not article III.

In particular, this Court has recognized that delineating the jurisdiction and standard of review of federal courts in habeas corpus cases is for Congress, whether or not in particular instances this Court agrees with the wisdom of that delineation. Justice Frankfurter put it thus (*Brown v. Allen*, 344 U.S. at 499):

Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. . . . It is not for us to determine whether this power should have been vested in the federal courts. As Mr. Justice Bradley, with his usual acuteness, commented not long after the passage of [the Act of 1867], "although it may appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on *habeas corpus*, there seems to be no escape from the law." *Ex parte Bridges*, 2 Woods (5th Cir.) 428, 432.

Accord, e.g., *id.* at 460 (Reed, J.); *Ex parte Royall*, 117 U.S. 241, 253 (1886); *Miller v. Fenton*, 474 U.S. at 112.

A. Congress Has Always Insisted on Plenary Federal Habeas Review for All Federal Rights of State Prisoners.

Since 1789, Congress' mandate concerning habeas corpus has been unequivocal. For every federal right available

to persons incarcerated pursuant to public authority, Congress has insisted upon a full, meaningful remedy in federal court for violations of that right.

1. Federal Habeas Corpus Prior to the Civil War

One of the earliest acts of the First Congress was its creation of the federal judiciary and delineation of some of the rights of persons in custody pursuant to federal authority. See Judiciary Act of 1789, ch. 20 § 14, 1 Stat. 81-82. At the very same time, Congress created a federal habeas corpus remedy for violations of those rights and made that remedy available to all prisoners "in custody, under or by colour of the authority of the United States." *Id.* While the habeas corpus powers of federal courts extended only to federal prisoners, so too did the Bill of Rights and other federal protections. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Peters) 243 (1833). State prisoners simply had no federal rights.

It was not long before Congress began affording substantive rights to certain classes of persons incarcerated by the states. In each instance, it accompanied its grant of rights with a coextensive federal habeas remedy for violations of those rights. Thus, in 1833 Congress empowered federal courts to entertain habeas petitions from state prisoners claiming to have acted under federal law. See Act of March 2, 1833, ch. 57 § 7, 4 Stat. 634. At the time, there was no doubt that federal authorization could have been raised as a defense to any prosecution in state court. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Nevertheless, Congress obliged federal courts in habeas proceedings to re-examine these federal defenses.

In 1842 Congress again extended federal rights to a class of persons in state custody—this time to foreign nationals held on account of an act claimed to have been done under color of foreign authority. See Act of Aug. 29, 1842, ch. 257, 5 Stat. 539. And again it legislated enforcement of these federal rights by authorizing federal courts to grant writs of habeas corpus to state prisoners

protected by the Act. See *In re Neagle*, 135 U.S. 1, 71-72, 74 (1890).

Under both Acts, the federal courts clearly understood that their review was to be *de novo*. As one court explained, anything less would allow "a law of the United States [to] be evaded and set at naught . . . by the specious pretences of law." *Ex parte Sifford*, 22 F. Cas. 105, 112 (C.C.S.D. Ohio 1857) (No. 12,848). When presented with petitions for writs of habeas corpus, federal courts routinely reviewed state-court legal determinations *de novo*. See, e.g., *Ex parte Robinson*, 20 F. Cas. 965 (C.C.S.D. Ohio 1856) (No. 11,934); *Ex parte Jenkins*, 13 F. Cas. 445 (C.C.E.D. Pa. 1853) (No. 7,259); *United States ex rel. Garland v. Morris*, 26 F. Cas. 1318 (C.C.D. Wis. 1854) (No. 15,811).

2. The Fourteenth Amendment and the Civil War Statutes

The Civil War revolutionized the relationship between the states and the federal government. Nowhere did this change manifest itself more than in the massive expansion of federal civil rights and their application in state proceedings. And as federal rights grew, so too did the habeas corpus remedy to protect them in federal courts if state courts did not. When the fourteenth amendment, along with a number of civil rights statutes, extended federal protections to all state prisoners, Congress immediately gave "the several courts of the United States . . . power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28 § 1, 14 Stat. 385.

The legislative history of the 1867 Act is sparse but unambiguous. Congress proclaimed its intention to make habeas corpus a bill of the largest liberty, available to "enforce the liberty of all persons," *Cong. Globe*, 39th Cong., 1st Sess. 4151 (1866) (Rep. Lawrence). As Senator Trumbull succinctly described the relationship between the new fourteenth amendment rights and Congress' simul-

taneous extension of the habeas corpus remedy (*Cong. Globe*, 39th Cong., 1st Sess. 4229 (1866)):

Now a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have . . . the benefit of the writ . . . [and] recourse to United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.

This Court clearly and promptly recognized the scope of the federal courts' power to review the adjudication by state courts of the newly enacted federal rights. One year after passage, Justice Chase, speaking for a unanimous court, explained (*Ex parte McCordle*, 73 U.S. (6 Wall.) 318, 321-322 (1868)):

This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.

In *Ex parte Royall*, 117 U.S. 241, 247 (1886), the Court similarly stated that "[t]he grant . . . of jurisdiction to issue writs of *habeas corpus* is in language as broad as could well be employed". See also *id.* at 253 (citing *Ex parte Bridges*, 2 Woods 428 (5th Cir. 1875)).

The 1867 Act does not state explicitly that federal review of state-court determinations of constitutional law must be plenary and independent. But neither, for that matter, has Congress ever said expressly that this Court's review of constitutional questions, even in cases arising from the federal courts, shall be *de novo*. In both contexts it is fundamental to Congress' scheme that review be plenary. Given the Reconstruction Congress' manifest distrust of the southern states' willingness to vindicate the new federal civil rights, there is simply no doubt that it contemplated plenary review by the federal courts. See, e.g., Wiecek, *The Reconstruction of Federal Judicial Power*,

1863-1875, 13 Am. J. Legal Hist. 333, 338, 342-43 (1969).² As then ABA-president Seymour D. Thompson reflected in a contemporary annotation, 18 F. 68, 81 (1883)):

The act of 1867 . . . extended the writ to all cases where the prisoner, though held under state process, might in the opinion of the federal court or judge issuing the writ, be held in violation of the constitution, or of any treaty or law of the United States.

3. Recodifications of the 1867 Act

Reconstruction, of course, has long since passed. In the ensuing century, Congress substantively revised the habeas corpus statute no less than *nine* times.³ It has considered proposed habeas corpus legislation in every Congress but one since 1948 and has held at least thirteen sets of hearings on habeas reform since 1955.⁴ Yet throughout—and notwithstanding the great changes this country has seen in the relation of the states to the federal government

² This Court has frequently invoked the legislative history of 42 U.S.C. § 1983 as evidence that the Reconstruction Congress intended to ensure access to federal courts to vindicate federal rights. See, e.g., *Felder v. Casey*, 487 U.S. 131, 147 (1988); *Patsy v. Board of Regents*, 457 U.S. 496, 503, 506-07 (1982); see also *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66-67 (1989). Interpreting the 1867 Act to mandate deference to state-court applications of the federal constitution would therefore rest on a counterintuitive assumption: that the Reconstruction Congress deemed federal court access to be less important for those people unconstitutionally confined by the states than for those seeking money damages under § 1983.

³ Act of March 27, 1868, 15 Stat. 44 (withdrawing Supreme Court appellate jurisdiction in habeas cases); Act of March 3, 1885, 28 Stat. 437 (restoring Supreme Court jurisdiction); Act of March 8, 1908, 35 Stat. 40 (certificates of probable cause); Act of Feb. 13, 1925, 43 Stat. 936 (habeas appeals); Act of June 25, 1948, 62 Stat. 964 (revision of Title 28); Act of May 24, 1949, 63 Stat. 105 (authority of individual justices to grant writ); Act of Sept. 19, 1966, Pub. L. No. 89-711, 80 Stat. 1105 (requiring deference to state court findings of fact); Act of Sept. 28, 1976, Pub. L. No. 94-426, 90 Stat. 1334 (ratifying, with modifications, the Rules Governing § 2254 Cases).

⁴ Citations to the above-referenced proposals and hearings are collected in the Brief for Senator Biden and Representative Edwards as *amici curiae* in Support of Respondent.

and the successive efforts to convince Congress to limit the breadth of federal habeas corpus—particularly as applied to state prisoners—the broad mandate of the habeas statute has not materially changed.⁵ Acting against the backdrop of this Court's decisions, Congress has successively recodified the habeas statute without limiting in any way the plenary review conducted by federal courts of all questions of federal constitutional law. Only last Term this Court confirmed that "the writ today . . . extend[s] to *all* dispositive constitutional claims presented in a proper procedural manner." *McCleskey v. Zant*, 111 S. Ct. 1454, 1462 (1991) (emphasis added).

B. Federal Courts Have Never Deferred to State Courts' Application of Constitutional Law.

While the 1867 Act, combined with passage of the fourteenth amendment and the subsequent expansion of procedural due process, vastly enlarged the *quantity* of federal rights state prisoners could raise on habeas, the *quality* of review mandated by Congress has never changed. Reflecting Congress' broad and unequivocal grant, federal courts have never deferred to state-court determinations or applications of federal law.

1. Review Prior to *Brown v. Allen*

For over fifty years following ratification of the fourteenth amendment, "due process" extended, at least ostensibly, only to the assurance that the state court had properly exercised "jurisdiction" over the defendant. *See, e.g., In re Juiro*, 140 U.S. 291 (1891). Even at that time,

⁵ Proposals to narrow the scope of federal habeas corpus review of state proceedings were before Congress during its 1884, 1908, 1925, 1945-48, 1955-59, 1961-66, 1968, 1971-73, 1981-82, 1985, and 1988-91 sessions, and on each occasion Congress chose to retain the basic structure, although sometimes imposing procedural restraints. (Proposals prior to 1945 are discussed, *e.g.*, in H.R. Rep. 730, 48th Cong., 1st Sess. 5-6 (1884) and Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 Ohio St. L.J. 307 (1983); later proposals are discussed in the briefs filed by *amici curiae* Biden *et al.*, Civiletti *et al.*, and Gunther *et al.*)

however, federal courts reviewed claims that a state proceeding violated a defendant's fundamental rights on the theory that a judgment in such a case was "void" or beyond the jurisdiction of the state court to enter. *See, e.g., Nielsen, Petitioner*, 131 U.S. 176 (1889); *In re Snow*, 120 U.S. 274 (1887). And whenever federal courts had before them habeas corpus petitions raising a recognized constitutional claim by a state prisoner, they never deferred to rulings of federal law made by the state courts.

For example, in *In re Wong Yung Quy*, 6 Sawyer 237 (C.C.D. Ca. 1880), the state argued that because its courts had jurisdiction to determine the constitutionality of the state statute in question, their judgment upholding its constitutionality was conclusive in a federal habeas proceeding. The federal court disagreed (*id.* at 239 (emphasis added)):

[I]t seems clear that the writ may issue and the prisoner be discharged whenever he is "in custody in violation of the constitution or of a law or treaty of the United States." In this case . . . whether he is in custody in violation of the constitution or treaty is *the very question to be investigated.*

See also United States ex rel. Spink, 19 F. 631 (C.C.E.D. La. 1884) ("[a]s the question in controversy is one as to the proper construction of the laws of the United States and of their force and effect, we feel bound to follow the adjudicated cases of our court, rather than the opinion of a state court"); *In re Ah Lee*, 6 Sawyer 410 (D. Or. 1880); *Ex parte Bridges*, 2 Woods 428 (5th Cir. 1875).

When it regained appellate jurisdiction in 1886, this Court similarly applied its own plenary review to issues of constitutional law previously adjudicated by the state courts. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *In re Snow*, 120 U.S. 274 (1887); *Nielsen, Petitioner, supra*; *In re Rahrer*, 140 U.S. 545 (1891); *Crowley v. Christensen*, 137 U.S. 86 (1890); *McElvaine v. Brush*, 142 U.S. 155 (1891). In those instances in which this Court deferred to a state-court determination that it had properly exer-

cised jurisdiction over the petitioner, the Court did so because the issue of a state court's jurisdiction was (and is) one of state law, to which federal courts must defer. *Cf. Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).⁶

The precise contours of the traditional deference federal courts have paid to state-court findings of fact animated the debate between Justices Pitney and Holmes in the famous case of *Frank v. Mangum*, 237 U.S. 309 (1915). Leo Frank contended that his murder conviction was constitutionally tainted because his entire trial had been dominated by a mob. Both sides agreed that the facts set forth in the petition, if "taken as true, may be conceded to show an environment inconsistent with a fair trial and an impartial verdict." *Id.* at 332. Neither side questioned the Court's duty to review *de novo* whether or not the facts established a constitutional violation.

The majority concluded, however, that the Georgia Supreme Court, acting in an environment free from any mob influence, had found the *facts* to be not as pleaded in Frank's petition (*id.* at 333):

⁶ Thus, for example, in *Felts v. Murphy*, 201 U.S. 123 (1906), the issue for the Court on habeas corpus was whether petitioner's state murder trial violated due process when, notwithstanding his near-total deafness, the court declined to provide him with the means to hear the proceedings. The Court determined, without reference to any conclusions by the state court, that while the trial court's failure was "to be regretted", it was not sufficiently grave "so as to violate the provisions of the 14th Amendment to the Federal Constitution." *Id.* at 130, 129. As to the state court's jurisdiction otherwise over the case, the Court treated that as a matter of fact properly found by the state court. See also *In re Converse*, 137 U.S. 624 (1891).

Contrary to the assertion made by *amicus* Criminal Justice Legal Foundation (Br. at 8-9), *In re Wood*, 140 U.S. 278 (1891), does not establish that, under the 1867 Act, federal courts were not empowered to exercise *de novo* review so long as the state court had jurisdiction. The claim in *Wood* was that the jurors had been selected discriminatorily—a question the Court viewed, at the time (prior to *Moore v. Dempsey*, 261 U.S. 86 (1923)), as one of *fact*, to which deference was properly due. See p. 15 *infra*. *Wood* in no way suggests that the Court would not review state-court conclusions of non-factual issues *de novo*, as *Converse* and *Felts* prove.

[T]he allegations of disorder were found by both of the state courts to be groundless except in a few particulars as to which the courts ruled that they were irregularities not harmful in fact to the defendant, and therefore insufficient in law to avoid the verdict.

The Court then opined that while these findings of fact by the Georgia courts could not be deemed "conclusively determined against the prisoner by the decision of the state court of last resort," at the same time they also "cannot, in this collateral inquiry, be treated as a nullity, but must be taken as setting forth the truth of the matter; certainly until some reasonable ground is shown" for concluding otherwise, which the majority of this Court did not find. *Id.* at 334, 336. Deferring to the state court's finding that no mob domination occurred, the majority concluded that due process had not been violated.

Justice Holmes, in dissent, argued that the issue was not simply one of deference to a state court's findings of historical fact: "When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts." *Id.* at 347. In other words, in Justice Holmes' view, the question of mob domination was what has come to be understood as a "mixed question" of law and fact, requiring the same independent plenary review as "pure" questions of law. Eight years later in a strikingly similar case, *Moore v. Dempsey*, 261 U.S. 86 (1923), the majority adopted Justice Holmes' view.

As due process was broadened to impose independent federal standards by which to judge state proceedings, it became well-established that federal habeas courts should defer to state courts on the historical facts—but not on the application of constitutional law to those facts. Thus, for example, in *Hawk v. Olsen*, 326 U.S. 271, 276 (1945), where the Court held that due process is violated "when a defendant is forced by the state to trial in such a way as to deprive him the effective assistance of counsel,"

Justice Reed, presaging his later opinion in *Brown v. Allen*, wrote (*id.* citations omitted; emphasis added):

When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right. . . . *When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings.*

Similarly, in *Wade v. Mayo*, 334 U.S. 672 (1948), this Court ordered the release of a state prisoner because it concluded that the state court's refusal to provide counsel at arraignment violated due process, regardless of what the state law provided. In so holding, the Court gave no deference whatsoever to the contrary conclusion of the state trial and appellate courts on the same point.⁷

⁷ These holdings in *Hawk v. Olsen* and *Wade* reveal the error by *amicus* Criminal Justice Legal Foundation (Br. at 12-13) in relying upon *dicta* in *Ex parte Hawk*, 321 U.S. 114 (1944), for the proposition that federal courts must defer to prior state-court rulings on federal constitutional law where the Supreme Court, upon a petition for writ of certiorari following direct appeal, "has either reviewed or declined to review the state court's decision." *Id.* at 118. The basis for this earlier *dicta* was: (1) the contemporary understanding that denial of a petition for a writ of certiorari constituted an "adjudication" of the legal questions raised, *see, e.g., White v. Ragen*, 324 U.S. 760, 764-65 (1945) (cited in *Brown v. Allen*, 344 U.S. at 456), and (2) the recognized principle, reflected in *Ex parte Cuddy*, 40 F. 62 (C.C.S.D. Cal. 1889); *Salinger v. Loisel*, 265 U.S. 224 (1924); and *Wong Doo v. United States*, 265 U.S. 239 (1924), that when a question has been adjudicated once by a federal court, subsequent review of the same question will apply a deferential "law and justice" standard. While this latter principle applies to this day, (*see* Rules Governing Section 2254 Cases in the United States District Courts, 9(b)), the former was discarded forever in *Brown v. Allen*. The *dicta* in *Ex parte Hawk*, therefore, retains vitality only to the extent this Court (or any other federal court) actually adjudicated the questions presented in a habeas petition in an earlier proceeding. *See* 28 U.S.C. § 2254(c). In all other instances, the clear holdings of *Hawk v. Olsen* and *Wade v. Mayo* govern.

2. *Brown v. Allen* and Its Progeny

In *Brown v. Allen* this Court made explicit the standard of review it had been applying for decades.⁸ Writing for the Court, Justice Reed stated that in all matters relating to a constitutional claim other than determining the underlying facts, "the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues." 344 U.S. at 458. Justice Frankfurter, writing a second opinion for the Court, explained more fully (*id.* at 506-08):⁹

State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide. . . .

Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts . . . the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.

The Court's decision in *Brown* fueled scholarly debate and prompted calls upon Congress to narrow the scope of federal review. But as to the issue raised by the Court in this case—whether a federal court in habeas corpus should

⁸ *See, e.g., Hart, Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 108-14 (1959); Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 Ohio St. L.J. 367, 382 (1983).

⁹ Petitioners' suggestion (Br. at 11-12 n.5) that Justice Frankfurter's opinion in *Brown* does not represent the views of the Court ignores Justice Frankfurter's unequivocal statement to the contrary, 344 U.S. at 497, and the silence of the remaining eight Justices in the face of his assertion. It also contradicts the widespread recognition of that opinion as speaking for the Court. *See, e.g., Fay v. Noia*, 372 U.S. 391, 461 (1963) (Harlan, J., dissenting); *Wainwright v. Sykes*, 433 U.S. 72, 79, 87 (1977); Hart, *supra*, at 106 & n.64.

"give deference to the state court's application of law to the specific facts of the petitioner's case"—three salient facts are not subject to legitimate debate.

First, it is plain from both opinions of the Court that the eight-justice majority understood its holding to reflect not a rule of judicial administration, but rather a matter "controlled by statute." 344 U.S. at 460 (Reed, J.); *id.* at 499-501 (Frankfurter, J.).¹⁰ What is most striking about the *amicus* brief submitted by the Solicitor General is the failure even to mention Congress, much less acknowledge the pervasive legislative power, and exercise of that power, in the area of habeas corpus. Compare, e.g., *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978).

Second, notwithstanding repeated and sustained efforts to convince Congress to mandate deference by federal courts in habeas corpus to state-court rulings on federal law, Congress has steadfastly adhered to the position that deference by federal courts is due findings of fact but not the application of federal constitutional law to those facts. The legislative histories of the 1948 and 1966 revisions to the habeas corpus statutes are discussed in the briefs of other *amici curiae* and will not be repeated here. In both instances Congress considered, but rejected, proposals to limit the scope of federal-court review of state-court rulings of law. The 1966 Act in particular reflected a deliberate choice by Congress to legislate deference to state-court findings of fact, but *not* to application of constitutional law to those facts. As this Court recognized in *Miller v. Fenton*, 474 U.S. at 111-12 (emphasis added):

The 1966 amendment was an almost verbatim codification of the standards delineated in *Townsend*

¹⁰ Constitutional scholars agree. See, e.g., Saltzburg, 44 Ohio St.L.J. at 368 (characterizing *Brown* as "the Court's best effort at statutory interpretation"); Monaghan, *The Burger Court and "Our Federalism"*, 43 Law & Contemp. Probs., No. 3, at 44, 49 (1980) (observing that "Congress seems to have codified relatively full federal collateral review of state criminal convictions" and stating that "reexamination must come from Congress rather than from the Court").

When a hearing is not obligatory, *Townsend* held, the federal court "ordinarily should . . . accept the facts as found" in the state proceeding. . . . Congress elevated that exhortation into a mandatory presumption of correctness. *But there is absolutely no indication that it intended to alter Townsend's understanding that the "ultimate constitutional question" of the admissibility of a confession was a "mixed questio[n] of fact and law" subject to plenary federal review.*

Miller v. Fenton, a recent 8-1 decision of this Court, also illustrates the *third* salient conclusion about *Brown v. Allen*—i.e., that this Court has faithfully followed its holding that issues of constitutional law, facial or as applied, are for the federal courts' independent, plenary review. See, e.g., *Rogers v. Richmond*, 365 U.S. 534, 546 (1961); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961); *Townsend v. Sain*, 372 U.S. 293, 312 (1963); *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972); *Brewer v. Williams*, 430 U.S. 387, 403-04 (1977); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980); *Sumner v. Mata*, 449 U.S. 539, 543-44 (1981); *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

In view of the extraordinary attention Congress has paid to habeas corpus, particularly in recent decades, and this Court's long string of precedents, it would be a particularly aggressive assumption of judicial power for the Court to reinterpret the 1867 Act today simply because it now questions whether *Brown* was the best interpretation of the 1867 Act or whether the policies of finality and comity would be better served by a different approach. Policy decisions are for Congress—not unelected members of the federal judiciary—and although Congress has long been aware of *Brown*, it has refused to alter it. See *Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 325 (1990). "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164,

172-173 (1989) (Kennedy, J.); see also *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986). As Chief Justice Rehnquist put it just a few weeks ago in *White v. Illinois*, 112 S. Ct. 736, 741 (1992), "the argument presented by the Government comes too late in the day to warrant reexamination of this approach."

II. *Teague* and Its Progeny Have Preserved Independent Review.

In the face of this history, the Solicitor General is quite candid that the United States and petitioners are asking the Court to overrule a series of its own precedents. Br. at 13. The Solicitor General argues, however, that it is "incongruous" to retain independent federal review for state-court application of law to facts because *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny already require federal courts to defer to state courts' "reasonable, good faith interpretations of law," Br. at 9. Those cases, however, do no such thing.

A. *Teague* Alters Retroactivity, Not the Standard of Review.

Teague and its progeny are cases about retroactivity. They establish that new rules of constitutional law announced after a conviction becomes final should not be applied by federal courts in habeas proceedings. Whether the petitioner is asking for the application of a "new rule" is a threshold question decided *before* the federal court examines the merits of the petitioner's claim.¹¹ If ruling

¹¹ The Court's language in *Teague* and subsequently concerning "reasonable, good-faith interpretations of existing precedents made by state courts," *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (quoting *Butler v. McKellar*, 494 U.S. 407, 414 (1990)), relates only to that first, threshold question: determining what the law *was* at the time of the state court decision. But *Teague* and subsequent cases repeatedly insist that whatever the law was at the time, it must be applied correctly and faithfully. See *Teague*, 489 U.S. 306-307; *Butler*, 494 U.S. at 412. In effect, *Teague* simply instructs federal courts to give petitioners no more relief than they could have received had this Court taken the case on direct appeal and applied existing law. See generally Mishkin, Foreword: The High

for the petitioner would require application of a new rule, then habeas corpus review of that claim is not available under *Teague*. But if not—and this point seems to be totally overlooked by the Solicitor General—then the federal court reviews the state court's conclusions (both on "pure" questions of law and on "mixed" questions of law and fact) *de novo*. See *Teague*, 489 U.S. at 306 (quoting *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)). There is no deference paid to state-court conclusions of constitutional law or applications of the Constitution to facts. As Associate Deputy Attorney General Andrew McBride (a signatory of the Solicitor General's brief) testified in Congress last summer: "Under present law, the *legal* determinations of state courts are entitled to no weight at all in federal habeas corpus proceedings."¹²

This Court has itself proven this point repeatedly since *Teague* was decided. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), for example, the Court determined, "as a threshold matter," *id.* at 313, that granting the petition would not create a "new rule" as that term was defined in *Teague*. The Court then went on to perform an independent, plenary assessment of the record below, see *id.* at 322-326, and independently applied the legal principles to that record. At no point in this analysis did the Court even mention, let alone defer to, the reasoning of the state court below.

Similarly, in *Estelle v. McGuire*, 112 S. Ct. 475 (1991), the Court reviewed *de novo* a state court's conclusion that the admission of certain evidence and a portion of a jury instruction did not violate due process. There was no contention that the petitioner sought a "new rule" under *Teague*: the only issue was whether the state court prop-

Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 86-87 (1965), Hart, *supra*, at 106-09; Wechsler, *Habeas Corpus and the Supreme Court*, 59 U. Colo. L. Rev. 167, 179-80 (1988).

¹² *Habeas Corpus Reform, Hearings before the House Judiciary Subcomm. on Civil and Constitutional Rights*, 102d Cong., 1st Sess. [hereinafter "1991 House Hearings"] (June 27, 1991).

erly applied the established rules. This Court, as well as the lower federal courts, treated that question *de novo*, apparently overlooking the "anomaly" so feared by the Solicitor General.¹³

B. Independent Review Is Required to Fulfill the Deterrence Stressed in *Teague*

Anything other than independent federal review would be fundamentally at odds with the very purpose of *Teague* and of the Court's recent pronouncements concerning the role of the habeas writ. The Solicitor General is correct when he observes (Br. at 9) that "[t]his Court's recent decisions have emphasized the basic purposes of federal habeas corpus—to ensure that state criminal proceedings are conducted consistently with the Constitution as interpreted at the time of the proceedings, and to deter unconstitutional action on the part of the state courts." As Justice Scalia explained: "Our holding in *Teague* rested upon the historic role of habeas corpus in our system of law, which is to provide a deterrence, the threat of which serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." *Penry v. Lynaugh*, 492 U.S. at 352 (Scalia, J., dissenting) (internal quotes omitted).¹⁴

¹³ The same is true of *Lewis v. Jeffers*, 110 S. Ct. 3092 (1990), where this Court followed *Jackson v. Virginia* in reviewing *de novo* the constitutional sufficiency of the evidence. See also *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Parker v. Dugger*, 111 S. Ct. 731 (1991); *Terrell v. Morris*, 493 U.S. 1 (1989). In none of these post-*Teague* cases has it ever been suggested that federal courts—once they satisfy themselves that they are not being asked to announce or apply a rule of constitutional law that did not exist at the time of the highest state court's judgment—should not apply plenary independent review of state-court applications of constitutional law.

¹⁴ The crucial incentive habeas review creates for state courts to adhere faithfully to uniform federal standards has been stressed even by those members of this Court most concerned about the costs of federal habeas review. As Justice Powell put it, concurring in *Solem v. Stumes*, 465 U.S. at 653 (quoting *Mackey v. United States*, 401 U.S.

There can be no doubt that the rule being considered today would subvert this important goal. *Teague* itself does not significantly detract from the deterrent function since it is hard to convince state courts to adhere faithfully to something "more" than the law as settled on the date of its decisions. Cf. *Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982). But if state courts are assured that their applications of the federal constitution will remain undisturbed so long as they are not "unreasonable" or "clearly erroneous," federal habeas corpus will no longer provide an incentive "to toe the constitutional mark." *Solem v. Stumes*, 465 U.S. at 653 (Powell, J., concurring). Accepting the petitioners' and Solicitor General's argument would mean that state courts will no longer need accurately to apply even settled law—so long as they do not stray so far as to manifest "judicial disobedience." Pet. Br. at 19. Nothing in *Teague*, or anywhere else, suggests that it should be acceptable for state courts to do something "less" than correctly apply settled constitutional law.

Moreover, if independent review is abandoned, no mechanism will remain to ensure that the constitutional protections guaranteed to defendants will be applied equally in all jurisdictions. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968) (Black, J. concurring). For if federal habeas review is superficial—merely checking to see if the state court's decision is "reasonable" or whether it articulated the correct legal standard—different levels of constitutional protections will inevitably develop in different states. See, e.g., *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946). While the announced standards of constitutional law may be equivalent everywhere, there is no reason to believe that all fifty state court systems will apply those standards

667, 687 (1971) (separate opinion of Harlan, J.): "Review on habeas to determine that the conviction rests upon correct application of the law in effect at the time of the conviction is all that is required to 'forc[e] trial and appellate courts . . . to toe the constitutional mark.'" Accord, *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting); *Saffle v. Parks*, 494 U.S. at 488; *Sawyer v. Smith*, 110 S. Ct. 2822, 2827 (1990); *Butler v. McKellar*, 494 U.S. at 413.

uniformly, as the history of habeas corpus in this country surely proves.

The Supreme Court alone cannot perform this necessary function. This Court's role has properly become one of resolving novel and thorny questions of federal law arising from both the state and federal courts. See Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 69 (1965). This Court simply cannot function as a court of errors to correct misapplications of federal law by the state courts. Indeed, the Court has made clear that mere error in the decision below does not justify granting a writ of certiorari. See, e.g., *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.17, at 221 (6th ed. 1986). Since the basic commands of the Bill of Rights were made applicable to state criminal proceedings, that role has always been filled by the lower federal courts. See generally Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 154 (1970); Mishkin, *supra*, at 87. The deference being considered today would all but remove the lower federal courts from that role, eviscerating the deterrent effect of federal habeas review.

C. Independent Federal Review Promotes, Rather Than Diminishes, the Benefits of Federalism.

Federal habeas review of state-court convictions inevitably results in some friction between federal courts and the states. That friction is simply the relatively small price Congress has chosen to pay for the precious safeguard to our liberty provided by the Great Writ. As this Court stated recently in *Reed v. Ross*, 468 U.S. 1, 10 (1984) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)), habeas corpus is a remedy designed to "interpose federal courts between the States and the people, as guardians of the people's federal rights."

Since passage of the 1867 Act, Congress and this Court have implemented doctrines to minimize that friction. E.g.,

28 U.S.C. § 2254(b) (exhaustion doctrine); *id.* § 2254(d) (deference to state-court findings of fact); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (adequate and independent state ground). Thereafter, the principal source of remaining friction was attributable to the fact that federal courts felt free to apply newly announced constitutional rules of criminal procedure to state-court judgments that had correctly applied constitutional precedents as they existed at the time. As this Court explained in *Engle v. Isaac*, 456 U.S. at 128 n.33: "State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." See also *Brown v. Allen*, 344 U.S. at 534 (Jackson, J., concurring).

Teague has now eliminated this strain. In this regime, it is patronizing and disrespectful to state judges even to suggest that deference is necessary when their decisions will be overturned only if they misapplied the federal law that was applicable at the time the conviction became final. As one state supreme court justice recently testified: "[A]s a state judicial officer, I have absolutely no problem with having the federal courts look over my shoulder in capital cases. In fact, in light of the historical data, I feel compelled to invite their review."¹⁵ Another stated:

To create a standard of deference that renders state courts the final arbiter of [constitutional law] is to ignore their institutional limitations and the need for predictability and uniformity in the federal law. . . . As a state judge, I welcome and rely upon the availability of federal habeas review of criminal cases for a number of reasons.¹⁶

¹⁵ 1991 House Hearings (May 22, 1991) (statement of Florida Supreme Court Justice Rosemary Barkett).

¹⁶ *Id.* (July 17, 1991) (statement of Utah Supreme Court Justice Christine M. Durham; emphasis omitted). See also *Habeas Corpus Legislation, Hearings before the House Judiciary Subcomm. on Courts, Intellectual Property, and the Administration of Justice*, 101st Cong., 2d Sess. 663-97 (May 24 and June 6, 1990) (statement of Mississippi Supreme Court Justice James L. Robertson).

If state courts are truly co-equals, there is no reason not to overturn their decisions when they were wrong, even if they were only "reasonably wrong."

III. Plenary Federal Review in Habeas Corpus Plays a Fundamental Role in Enforcing the Bill of Rights.

The role federal habeas corpus has played in enforcing constitutional rights cannot be overstated. Even during the last decade, this Court—unambiguously exercising plenary independent review of the constitutional issues presented—has found it necessary to grant habeas corpus relief to prisoners who were convicted and sentenced to die under a statute that was unconstitutionally vague and overbroad;¹⁷ by a jury from which blacks and women had been intentionally excluded;¹⁸ by a jury instructed that, in passing sentence, it could not consider the defendant's brain damage, his cooperation with the police, and his capacity for rehabilitation;¹⁹ and by a jury instructed that it need not find the defendant guilty beyond a reasonable doubt.²⁰ The Court has also recently found it necessary to grant the writ to defendants represented by incompetent trial counsel²¹ or indicted by grand juries from which blacks and Hispanics were systematically excluded;²² and to a defendant convicted because he exercised his constitutional right to silence.²³

Nothing better illustrates the critical need to preserve independent federal court review of the application of con-

¹⁷ *Maynard v. Cartwright*, 486 U.S. 356 (1988).

¹⁸ *Amadeo v. Zant*, 486 U.S. 214 (1988).

¹⁹ *Hitchcock v. Dugger*, 481 U.S. 393 (1987); see also *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Aldridge v. Dugger*, 925 F.2d 1320 (11th Cir. 1991); *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991).

²⁰ *Francis v. Franklin*, 471 U.S. 307 (1985); see also *Reed v. Ross*, 468 U.S. 1 (1984).

²¹ *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

²² *Vasquez v. Hillery*, 474 U.S. 254 (1986); *Castaneda v. Partida*, 430 U.S. 387 (1977).

²³ *Wainwright v. Greenfield*, 474 U.S. 284 (1986).

stitutional law to the facts found by state courts than a study presented last summer to Congress by the ABA. The study analyzed all cases between July 1976 and May 1991 in which state prisoners under sentence of death completed the process of securing habeas corpus review of their judgments of conviction and death sentence.²⁴ The findings of this comprehensive study must give pause to anyone advocating a reduction in the standard of federal review. Out of the 361 decisions during this period which resulted in published opinions by the federal courts of appeals, the federal courts found constitutional violations of a magnitude requiring reversal in 145 instances. This is a constitutional error rate of *forty* percent.²⁵ Reviewing *all* documented cases (*i.e.*, final decisions from all federal courts, regardless of whether a full opinion was written), the constitutional error rate was *forty-six* percent (186 out of 407 capital judgments). In other words, in over four out of every ten capital cases in which the state courts, upon direct and collateral review, have found no constitutional error, the federal courts, according full deference under 28 U.S.C. § 2254(d) to state-court findings of fact, have concluded that constitutional error compelled issuance of the writ.

In each of these reported cases, federal review was preceded by a full state-court review on the merits of the constitutional claims.²⁶ The vast majority involved not pure questions of constitutional law, but rather the application of that law to the facts as found in the state courts. In many cases the state courts issued lengthy published opin-

²⁴ 1991 House Hearings (July 17, 1991) (Appendix to Statement of John Curtin, Jr.).

²⁵ This figure does not even include the many instances in which constitutional error was found but determined not to require reversal under *Chapman v. California*, 386 U.S. 18 (1967). A separate study by *amicus* Criminal Justice Legal Foundation found a reversible-error rate of 39.4 percent. See H.R. Rep. No. 242 (Part 1), 102d Cong., 1st Sess. 124 (1991).

²⁶ Otherwise, under the doctrines of exhaustion and procedural default, federal courts would not have considered the claims.

ions. Yet in applying settled constitutional law they were very frequently *wrong*—even where the defendant's life was at stake.²⁷

It may very well be that some of these cases would have been reversed by federal courts even under a deferential standard of review. But can this Court say with assurance that all, or even almost all, of the constitutional errors by state courts will be remedied by federal courts which defer to a state court's application of the constitution to the facts presented? Surely not. And that, *amicus* respectfully suggests, is the very crux of the matter. As striking as the current statistics are, the issue is not really whether the rate of constitutional error is forty percent or twenty percent or even five percent. In 1952, when *Brown v. Allen* was decided, only 1.8% of habeas petitions presented to federal courts during the prior seven years had been granted. Yet, the Court explained (*id.* at 498): "The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by indiscriminating generalities." As lawyers and judges, we can never achieve perfect justice. But "surely", as Justice

²⁷ Of course it may be argued that in some of these 186 cases, the federal courts were "wrong" while the state courts were "right". "Whenever decisions of one court are reviewed by another, a percentage of them are reversed, and reversals alone are 'not proof that justice is thereby better done.'" *Brown v. Allen*, 344 U.S. at 540 (Jackson, J., concurring). But as state judges are frank to acknowledge, *see, e.g.*, p. 25 *supra*, state courts frequently lack the resources, expertise, and often the independence that comes with life tenure, which the federal judiciary enjoys. Moreover, even assuming state courts are correct just as often as federal courts, it therefore follows that state courts overlook reversible constitutional error not 46% but "only" 23% of the time. And if one round of plenary federal review means granting habeas relief to some defendants who do not "deserve" it, that is consistent with one of the most basic principles of our justice system: that it is better for a guilty person to be set free (or more accurately, to be retried or resentenced), than for an innocent man to be unjustly imprisoned (much less executed). *See, e.g.*, Mishkin, *supra*, at 80-81; J. Frank & B. Frank, *Not Guilty*, 11-12 (1957).

Frankfurter stated in *Brown*, 344 U.S. at 498-99:

it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they involve limitations upon State power and may be invoked by those morally unworthy. Under the guise of fashioning a procedural rule, we are not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress on the District Courts. Rules which in effect treat all these cases indiscriminately as frivolous do not fall far short of abolishing this head of jurisdiction.

IV. Federal Judges Should Not Be Directed To Affirm Applications of Settled Constitutional Law They Conclude Are Incorrect.

How, then, are federal judges to adjudicate the habeas corpus petitions that have so often in the past revealed serious constitutional error? Federal judges are sworn to uphold the Constitution, 28 U.S.C. § 453, and mandated by Congress to "entertain an application for a writ of habeas corpus" from, and to "forthwith award" the writ to, any state prisoner "in custody in violation of the Constitution." If henceforth they are not to review the application of settled constitutional principles in a plenary, independent fashion, how can they uphold their oaths and satisfy their statutory mandate? Deference to state fact-finding is one thing: it has been mandated by Congress, it is embedded in our jurisprudence, and it leaves federal judges free to uphold the Constitution against those facts. But deference to state-court conclusions as to the correct application of constitutional law means inevitably that some state-court decisions on constitutional law that would otherwise be vacated as incorrect would be affirmed. Affirmance of a constitutional decision that is "reasonable," but wrong, cannot be squared either with the judge's oath or with Congress' mandate.

Requiring deference to state-court applications of constitutional law would thrust federal judges into a role unknown to them for more than 180 years. In no other context have federal judges ever been told to subordinate

their opinions about the proper application of the Constitution to the determinations of any other body. The role of federal courts as the final authority on federal constitutional law has long been unquestioned. Indeed, requiring federal judges to accept rulings they conclude have wrongly applied the Constitution is more damaging to the rule of law than eliminating substantive review altogether where the state court has conducted a "full and fair hearing." In that sort of system (which Congress has twice rejected and which the ABA strongly opposes), while incorrect rulings would escape review, at least a federal judge would not be asked to place his or her imprimatur on them.

CONCLUSION

For the foregoing reasons, this Court should reaffirm that in considering a petition for a writ of habeas corpus by a person in state custody, a federal court must exercise plenary, independent review of the state court's application of federal constitutional law to the facts.

Respectfully submitted,

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No. 91-542

Supreme Court, U.S.
FILED
MAR 4 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

ELLIS B. WRIGHT, JR., WARDEN, *ET AL.*,

Petitioners,

-v.-

FRANK ROBERT WEST, JR.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR SENATOR BIDEN AND
REPRESENTATIVE EDWARDS
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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March 4, 1992

QUESTION PRESENTED

Amici curiae will address the following question:

In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

ELLIS B. WRIGHT, JR., WARDEN, *ET AL.*,

Petitioners,

-v.-

FRANK ROBERT WEST, JR.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR SENATOR BIDEN AND REPRESENTATIVE
EDWARDS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*^{1/}

Senator Biden is the Chairman of the Senate Committee on the Judiciary, with primary jurisdiction over the habeas corpus issue. Representative Edwards is the Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, also with primary jurisdiction over the issue. They file this brief as *amici* in the belief that the question posed by the Court raises fundamental separation of powers issues. The Constitution grants to the Congress the power to prescribe the scope of review in habeas corpus actions. On many occasions, the Court has held that Congress has exercised

^{1/} This brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk.

that power to require *de novo* review of properly presented constitutional questions.

Yet the invitation to the parties to brief the question whether the Court should substitute a standard of deference for *de novo* review suggests that the issue is one of judicial policy. Because Congress has already decreed *de novo* review, a ruling by the Court that the statute permits deference would contravene the congressional will and invade prerogatives the Constitution entrusts to the legislative branch.

The briefs filed in this case by respondent and the other *amici* who support him will address the statutory construction issue in considerable detail. The principal purpose of *this* brief is to present to the Court information reflecting the longstanding congressional concern for, and attention to, the federal habeas statute. We focus in particular on Congress's most recent consideration of proposals to change the scope of review, and invite the Court's attention to an existing bill that awaits only final action from the Senate before being presented to the President. We offer this information as a demonstration of our interest as *amici*, and in the hope that it may prove useful to the Court in its disposition of the question presented.

SUMMARY OF ARGUMENT

The question posed by the Court in this case raises an issue of statutory construction, not judicial policy. The Constitution bestows on Congress the power to decide the standard of review in habeas cases. Both in the original Habeas Corpus Act of 1867, and in the amendments to that Act in 1966, Congress provided for *de novo* review. Since 1966 Congress has repeatedly considered but rejected

proposals to change that standard in favor of one more deferential to state court adjudications. These policy determinations are not subject to override by the Court. "Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." *TVA v. Hill*, 437 U.S. 153, 194 (1978).

Congress has considered habeas reform bills in 27 of the last 37 years and has enacted legislation on three occasions. Moreover, proposals to narrow the scope of review are before Congress today. In the First Session of the 102d Congress the Senate accepted the Administration's proposal to bar federal habeas relief on any claim that was "fully and fairly adjudicated" in state court. After considerable deliberation, however, the House chose to retain *de novo* review as part of a comprehensive habeas corpus reform plan. A conference committee adopted the House's comprehensive reforms, and the House has approved the conference bill. The Senate has not yet voted on this pending legislation.

Of course, the Constitution's allocation of powers is not affected by what legislative issues happen to be pending before Congress. But the fact that Congress has just finished considering proposals regarding the scope of review in habeas cases and is on the brink of passing a new statute highlights the inappropriateness of the Court's suggestion that these issues are matters for judicial rather than legislative resolution.

Principles of *stare decisis* further support our view. "[I]n an area that has seen careful, intense, and sustained congressional attention" -- such as habeas corpus -- the Court has been "especially reluctant" to overrule settled statutory interpretations. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986).

ARGUMENT

IT IS FOR CONGRESS, NOT THE COURT, TO DECIDE THE STANDARD OF REVIEW IN HABEAS CASES, AND CONGRESS HAS PROVIDED FOR DE NOVO REVIEW

The petitioners in this case and several *amici* who support them cast their arguments primarily in terms of policy. Hence, contending for deference, the petitioners (at p. 9) discuss their view of the "core purpose" of habeas corpus and argue that their position "makes great good sense." The brief of the United States is similarly rife with appeals to policy, promising that deference will not "undermine the deterrent purposes of habeas" (at p. 15) and "has the considerable virtue of workability" (at p. 16). Several states also argue (at p. 8) for deference on the theory that state courts "have undergone dramatic change" since Congress last revised the habeas statute in 1966.

These arguments proceed from the incorrect premise that the policy considerations underlying the scope of habeas review are within the Court's province to decide. On the contrary, exercising its prerogatives under Article III of the Constitution, Congress has already defined the appropriate scope of review. The Court has already recognized Congress's definition and implemented the congressional will in this regard, and thus the correct answer to the question posed by the Court requires a reaffirmation of the Court's earlier interpretation of the federal habeas statute. That is especially true since, as we show below, Congress has been pointedly aware of the Court's interpretation of the statute as calling for *de novo* review, and in recent years has spent much effort considering but in the end declining proposals to change the law.

A. The 1867 Statute Provided For De Novo Review.

The federal courts' habeas corpus jurisdiction is governed by statute. See 28 U.S.C. §§ 2241-56. The First Congress defined the power of the federal courts to issue writs of habeas corpus for federal prisoners.^{2/} In 1833 Congress extended the Writ to state prisoners allegedly held for committing acts authorized by federal law.^{3/} For our purposes, however, the Habeas Corpus Act of 1867 has paramount historical significance. We believe, for the reasons more fully articulated in the *amicus curiae* brief of the American Bar Association, that that Reconstruction statute clearly intended federal courts to provide *de novo* review of claims by state prisoners that they were restrained "in violation of the constitution, or of any treaty or law of the United States * * *." Act of Feb. 5, 1867, Ch. 28, 14 Stat. 385.

The Civil War Amendments profoundly altered the balance of our federalism, see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976), and the congressional enactments of the same era, no less than the Amendments themselves, reflected Congress's insistence on the protection of federal rights. See, e.g., *Mitchum v. Foster*, 407 U.S. 225, 238, 242 (1972) (predecessor to § 1983 was "a product of a vast transformation from the concepts of federalism that had

^{2/} The Judiciary Act of 1789 stated that the courts of the United States "shall have power to issue writs of * * * habeas corpus," provided that the writs "shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States * * *." Ch. 20, § 14, 1 Stat. 73, 81-82.

^{3/} Act of Mar. 2, 1833, Ch. 57, § 7, 4 Stat. 632, 634. In 1842, Congress extended the Writ to foreign nationals held by the states for acts authorized by foreign authority. Act of Aug. 29, 1842, Ch. 257, 5 Stat. 539. See *In re Neagle*, 135 U.S. 1, 70-71 (1890) (explaining circumstances prompting Congress to pass the 1833 and 1842 Acts).

prevailed in the late 18th century" and "an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment."). The relationship between the Fourteenth Amendment and the greatly expanded habeas statute is amply demonstrated in the American Bar Association brief, and we concur with the conclusion that Congress in 1867 did not contemplate federal court deference to state court adjudication of constitutional issues.

Moreover, since 1867, Congress has not left the further development of habeas corpus law to the courts. It has substantively revised the habeas provisions eight times. In 1868 it relieved the Court of its appellate jurisdiction in habeas cases, but restored that jurisdiction in 1885.^{4/} In 1908 Congress imposed the certificate of probable cause requirement in response to concerns that state prisoners were filing frivolous appeals.^{5/} And the Judiciary Act of 1925 removed the right of direct appeal from the district court to the Supreme Court.^{6/}

In 1948 Congress revised and re-enacted the habeas statutes, adding provisions addressing exhaustion of state

4/ Act of Mar. 27, 1868, Ch. 34, § 2, 15 Stat. 44 (removing Supreme Court appellate jurisdiction); *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1868) (upholding 1868 Act); Act of Mar. 3, 1885, Ch. 353, 23 Stat. 437 (restoring Supreme Court appellate jurisdiction).

5/ Act of Mar. 10, 1908, Ch. 76, 35 Stat. 40. See Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 Ohio St. L. J. 307, 313-14 (1983) (describing Act and its legislative history).

6/ Act of Feb. 13, 1925, Ch. 229, §§ 6, 13, 43 Stat. 936, 940, 941. See Robbins, *supra* note 5, at 313 & n.36 & n.39 (explaining changes made by 1925 Act).

remedies and discretion to deny successive petitions as well as clarifying procedures for habeas hearings.^{7/}

Between 1955 and 1966 Congress considered numerous proposals for substantial habeas reform, including at least three from the Judicial Conference of the United States.^{8/} Congress held two sets of hearings,^{9/} issued at least seven reports,^{10/} and thoroughly debated the issues over that ten-year period.^{11/} That exhaustive process culminated in the 1966 amendments to 28 U.S.C. § 2254, Pub. L. No. 89-711, 80 Stat. 1104, discussed further below. In that same year Congress also amended 28 U.S.C. § 2241

7/ Act of June 25, 1948, Ch. 646, 62 Stat. 869, 965-67 (codified as amended at 28 U.S.C. §§ 2241-2254).

8/ See H.R. Rep. No. 548, 86th Cong., 1st Sess. 15-36 (1959) (reprinting 1953 and 1959 reports); H.R. Rep. No. 1892, 89th Cong., 2d Sess. 12-37 (1966) (reprinting 1965 report).

9/ *Habeas Corpus: Hearings on H.R. 5649 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 84th Cong., 1st Sess. (1955); *Habeas Corpus: Hearings on H.R. 6742, H.R. 4958, H.R. 3216, and H.R. 2269 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 86th Cong., 1st Sess. (1959).

10/ H.R. Rep. No. 1200, 84th Cong., 1st Sess. (1955); H.R. Rep. No. 1293, 85th Cong., 2d Sess. (1958); S. Rep. No. 2228, 85th Cong., 2d Sess. (1958); H.R. Rep. No. 548, 86th Cong., 1st Sess. (1959); H.R. Rep. No. 1384, 88th Cong., 2d Sess. (1964); H.R. Rep. No. 1892, 89th Cong., 2d Sess. (1966); S. Rep. No. 1797, 89th Cong., 2d Sess. (1966).

11/ E.g., 102 Cong. Rec. 935-40 (1956) (House debate and passage); 104 Cong. Rec. 4668-75 (1958) (same); *id.* at 17331-37 (statement of Sen. Proxmire) (criticizing House bill); *id.* at 19336-44 (statement of Sen. Morse) (criticizing House bill and including opposition statements of various organizations and individuals); 105 Cong. Rec. 14630-37 (1959) (House debate and passage); 110 Cong. Rec. 14678-84 (1964) (same); 112 Cong. Rec. 21754-56 (1966) (House passage); *id.* at 27974-75 (Senate passage).

to provide greater flexibility in habeas venue requirements.^{12/} And in 1976 Congress approved (with amendments) rules proposed by the Court governing habeas proceedings.^{13/}

Counting instances in which Congress appraised but declined to enact proposed habeas amendments, Congress has actively considered habeas corpus legislation during 27 of the past 37 years,^{14/} and during that period held at least 14 sets of hearings,^{15/} and passed legislation three times.^{16/}

^{12/} Pub. L. No. 89-590, 80 Stat. 811 (1966) (permitting state prisoner to file petition in district where he was convicted as well as district where he is incarcerated). See S. Rep. No. 1502, 89th Cong., 2d Sess. 2 (1966) (bill will alleviate two problems: concentration of habeas filings in those districts where state penitentiaries are located; and difficulty in holding hearings hundreds of miles from the trial site).

^{13/} Pub. L. No. 94-426, 90 Stat. 1334 (1976). See H.R. Rep. No. 1471, 94th Cong., 2d Sess. 2 (1976) ("After a careful study of all the proposed rules, the Committee on the Judiciary has concluded that the majority of them ought to be approved as drafted."); *Habeas Corpus: Hearings on H.R. 15319 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976).

^{14/} See *supra* notes 9-12 (1955-60, 1963-66); *infra* pp. 10-11 (1968); *infra* pp. 11-12 (1971-74); *supra* note 13 (1976); *Federal Habeas Corpus: Hearing on S. 1314 Before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978); *infra* note 21 (1981); *infra* pp. 12-14 (1982-86); *infra* pp. 14-16 (1988-1991).

^{15/} See *supra* note 9 (1955 and 1959); *infra* p. 11 (1971 and 1972); *supra* note 13 (1976); *supra* note 14 (1978); *infra* note 21 (1981); *infra* pp. 12-14 (1982, 1983 and 1985); *infra* pp. 14-16 (two sets of hearings in each 1990 and 1991).

^{16/} See *infra* p. 9 (1966); *supra* note 12 (1966); *supra* note 13 (1976).

B. The 1966 Act Reaffirmed De Novo Review.

One *amicus* supporting petitioners claims that Congress has never "spoken a word" on the question posed by the Court. Brief of *Amicus Curiae* Criminal Justice Legal Foundation at p. 18. That claim simply ignores what Congress has done, and what it has refused to do, in the nearly 40 years since *Brown v. Allen*, 344 U.S. 443 (1953), in which the Court construed the habeas statute to require *de novo* review of state court determinations.

The 1966 amendments added § 2254(d), which generally requires a federal habeas court to defer to state court findings of fact. No deference is required for questions of law, or the application of law to fact. The omission was not accidental. As we have seen, the 1966 amendments were the culmination of a ten-year debate over the proper scope of review, a debate prompted by the Court's ruling in *Brown* and later decisions of the Court confirming the *de novo* standard.^{17/} During that time, Congress actively considered proposals to overrule *Brown* and mandate deference across the board. For example, the House twice passed a bill prohibiting a federal court from reconsidering an issue of fact or law after "full and adequate" state court consideration.^{18/} The Senate,

^{17/} In 1953, following the *Brown* decision, the Judicial Conference appointed a Special Committee on habeas corpus to study asserted abuses of the Writ and to make recommendations to the full Conference. The Conference adopted the Committee's report and forwarded it to Congress, and the debate began. Over the course of the following ten years, the Judicial Conference made two more reports to Congress. For citations to the hearings and debates over this period, see *supra* notes 9-11. For an in-depth narrative of the proceedings, see the Brief of *Amici Curiae* Benjamin R. Civiletti, Nicholas deB. Katzenbach, Edward H. Levi, Elliot L. Richardson, *et al.*

^{18/} 102 Cong. Rec. 935-40 (1956); 104 Cong. Rec. 4668-75 (1958).

however, refused to adopt that legislation. Instead Congress settled on deference only for factual determinations, demonstrating its endorsement of what it understood the law to provide for other determinations -- *de novo* review.

C. Since 1966, Congress Has Repeatedly Rejected Pleas to Give More Deference to State Court Determinations, Including Their Application of Law to Fact.

Following the 1966 amendments, the executive branch, the States, and others returned to the halls of Congress seeking more deference to state court determinations. Efforts toward a legislative overruling of the Court's construction of the statute have continued since then, but none has succeeded.

1. 1968.

In 1968 the Senate Judiciary Committee reported out an omnibus crime bill which would have made a state court judgment conclusive in a habeas proceeding with respect to all questions of *law or fact* which were determined, or which could have been determined, in the state court proceeding. S. 917, 90th Cong., 2d Sess. § 702 (1968), *reprinted at* 114 Cong. Rec. 11186, 11189 (1968). The majority of the Committee was attempting to overturn what it recognized as existing law -- *de novo* review. S. Rep. No. 1097, 90th Cong., 2d Sess. 63-65 (1968). Those Committee members who opposed the proposal agreed with the majority on one point: the proposal would change existing law. See *id.* at 159-60 (attacking the proposal as an attempt "to roll back a century of progress in American constitutional law").

The full Senate carefully considered the Committee's proposal as well as the opposition of the Judicial Conference and others, and rejected it. See 114 Cong. Rec. 11596-97

(1968) (statement of Sen. Morse) (criticizing proposal); *id.* at 12829-36 (1968) (statement of Sen. Tydings) (reviewing history of habeas and criticizing proposal); *id.* at 13850-67 (statement of Sen. Tydings) (noting opposition of Judicial Conference and the American Bar Association, and including opposition letters from 212 legal scholars); *id.* at 14082-84 (statement of Sen. Tydings) (including ABA opposition resolution); *id.* at 14181-84 (agreeing to amendment to delete provision from bill).

2. 1971-1974.

In 1971, the Department of Justice recommended that the Senate add to a pending speedy trial bill provisions limiting the Writ to state prisoners who could show that their trial was unfair and that the unfairness played a part in the conviction. See *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 93-121 (1971) (testimony of Assistant Attorney General William H. Rehnquist). Meanwhile, the House Judiciary Committee considered a bill supported by the National Association of Attorneys General ("NAAG") proposing similar habeas restrictions. See H.R. 11441, 92d Cong., 1st Sess. (1971).^{19/}

The Department of Justice and NAAG eventually united behind a proposal which would have allowed habeas relief only if a substantial constitutional question "was not theretofore raised and determined." H.R. 13722, 92d Cong., 2d Sess. (1972); S. 3833, 92d Cong., 2d Sess. (1972); see 119 Cong. Rec. 2220-26 (1973) (statement of Sen. Hruska)

^{19/} A subcommittee held hearings on H.R. 11441, but the transcript was not printed. See *Final Legislative Calendar, House Comm. on the Judiciary*, 92d Cong., 2d Sess. 130 (1972) (noting that subcommittee held hearing on bill on Feb. 23, 1972); *Congressional Quarterly Weekly Report*, Vol. 30, No. 10, at 501-02 (Mar. 4, 1972) (summarizing testimony).

(discussing history of Justice and NAAG efforts). Under this proposal, a federal habeas court would have had to defer to a state court application of law to fact. The Attorney General supported the bill because, among other things, he said that it would have limited the effect of *Brown*. See 119 Cong. Rec. 2222 at 2224 (1973) (reprinting 1972 letter by Attorney General Richard G. Kleindienst) ("Since the decision in *Brown*, however, Federal courts have routinely reviewed the merits of final State court decisions."). After considering this proposal, neither the Senate nor the House Committee reported it out.

The same proposal was introduced again in the 93d Congress (1973-74). See H.R. 3329, 93d Cong., 1st Sess. (1973); S. 567, 93d Cong., 1st Sess. (1973). It was subject to substantial criticism, see *Report of Special Subcomm. on Habeas Corpus to the Judicial Conference* (Sept. 1973) (recommending that proposal be disapproved); Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners -- Reform or Revocation?*, 61 Geo. L. J. 1221 (1973) (criticizing proposal), and the Committees again did not report it.

3. 1982-1986.

In 1982 the Attorney General transmitted to Congress a proposal that would have required federal habeas courts to defer to state court determinations -- including the application of law to fact -- where the prisoner had had a full and fair opportunity to litigate the issue in state court. The Senate Judiciary Committee held hearings on this proposal, but did not report a habeas reform bill. See *The Habeas Corpus Reform Act of 1982: Hearing on S.*

2216 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982).^{20/}

In the following Congress, the Senate Judiciary Committee held more hearings and reported the proposal to the full Senate. See *The Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983); S. Rep. No. 226, 98th Cong., 2d Sess. (1983). The Committee report made clear two important points. First, the Committee understood that current law required federal courts to review *de novo* the application of law to the facts. See *id.* at 22 ("Under current law, a Federal habeas court * * * is automatically required to make an independent determination of questions of law, and to re-apply the law to the facts, no matter how fully and fairly that has been done in the State proceedings.") (emphasis added).^{21/} Second, the Committee meant the "full and fair" standard to be highly deferential. See *id.* at 24-28.

^{20/} After the hearings, the proposal was re-introduced with clarifying amendments as S. 2838, 97th Cong., 2d Sess. (1982). See S. Rep. No. 226, 98th Cong., 2d Sess. 2 (1983); 128 Cong. Rec. 24430 (1982) (statement of Sen. Thurmond) (including section-by-section analysis of S. 2838). Similar proposals were introduced in the House, but the House Judiciary Committee took no action. See S. Rep. No. 226, *supra*, at p. 2 n.3.

^{21/} See also 128 Cong. Rec. 24430 (1982) (section-by-section analysis of predecessor bill) (same quote); *Habeas Corpus Procedures Amendments Act of 1981: Hearings on S. 653 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 22 (1981) (statement of Assistant Attorney General Jonathan C. Rose) (proposal not including "full and fair" test does not go far enough because it "would not alter the rules that presently require automatic redetermination by the Federal habeas corpus court of purely legal questions and mixed questions of law and fact, even where such questions have been fully and fairly explored and decided in State proceedings.").

The Senate passed this proposal in 1984, see 130 Cong. Rec. 1854-72 (1984), but the House chose to take no action on it.^{22/}

Proponents revived the proposal again in the 99th Congress (1985-86), and, although hearings were held, the proposal was not reported out of Committee. See *Habeas Corpus Reform: Hearing on S. 238 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985).

4. 1988-1992.

The current round of debate over the scope of review in federal habeas cases began in 1988, when Chief Justice Rehnquist appointed an *ad hoc* Special Committee of the Judicial Conference, chaired by retired Justice Powell, to study habeas corpus litigation in death penalty cases. The Anti-Drug Abuse Act of 1988 mandated the chair of the Senate Judiciary Committee to introduce a habeas corpus reform bill within fifteen legislative days following the receipt of the Special Committee Report. The Act further provided a detailed timetable for Senate consideration of the legislation introduced in response to the Special Committee's Report, and stated that the House was to give "fair, appropriate, and expeditious consideration" to the Special Committee Report. Pub. L. No. 100-690, § 7323, 102 Stat. 4181, 4468.

^{22/} Senators on both sides of the issue recognized during the floor debate that the "full and fair" standard would have changed existing law. See, e.g., 130 Cong. Rec. 1862 (1984) (statement of Sen. Baucus) ("By deleting [the "full and fair" standard] from the bill, my amendment would leave existing law on this issue as it now exists. That is, State prisoners would continue to be entitled to full and independent review of their Federal claims in Federal courts."); *id.* at 1869 (statement of Sen. Denton) ("[D]eference to State adjudications that are 'full and fair' * * * would be a vast improvement over the current rules, which provide through habeas corpus proceedings for mandatory readjudication * * *").

The 101st Congress received and considered the recommendations of the Special Committee, as well as other habeas reform proposals. After hearings and extensive debate in both Chambers, the Senate and House passed different habeas provisions as part of omnibus anti-crime bills.^{23/} The conference committee, however, could not reach agreement on the habeas provisions in the closing hours of the Congress; it omitted any habeas reform provision from the bill that was eventually enacted. See Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789; 136 Cong. Rec. H13288 (daily ed. Oct. 27, 1990) (statement of Rep. Brooks); *id.* at H13296 (statement of Rep. Edwards).

The 102d Congress has taken up the subject yet again.^{24/} Both the House and the Senate considered the Administration's proposal to bar a federal court from granting the Writ based on any claim that was "fully and fairly adjudicated" in state court. This proposal -- like the one passed by the Senate in 1984 -- would change current

^{23/} See *Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S. 1760 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st and 2d Sess. (1989-90); *Habeas Corpus Legislation: Hearings on H.R. 4737, H.R. 1090, H.R. 1953, and H.R. 3584 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990); H.R. Rep. No. 681, 101st Cong., 2d Sess., pt. 1, at 111-40 (1990); 136 Cong. Rec. S6805-34 (daily ed. May 23, 1990); *id.* at S6883 (daily ed. May 24, 1990); *id.* at H8870-82 (daily ed. Oct. 4, 1990); *id.* at H9042 (daily ed. Oct. 5, 1990).

^{24/} The Senate Judiciary Committee held hearings on habeas corpus reform on May 7, 1991. The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee held hearings on May 22, June 27, July 11, and July 17, 1991. To date, the Government Printing Office has published the transcript of only one day of testimony. See *Race Claims and Federal Habeas Corpus: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. (July 11, 1991).

law and replace it with a standard of review that would require substantial deference to the state court's legal conclusions. See, e.g., *Statement of Andrew G. McBride, Associate Deputy Attorney General, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, June 27, 1991, at 19 ("[U]nder present law, the legal determinations of the state courts are entitled to no weight at all in a federal habeas corpus proceeding.").

Congress has not adopted the "full and fair" proposal. While the Senate did adopt this deferential standard, the House, after careful consideration and full debate, chose instead to retain *de novo* review as part of a comprehensive reform of the federal habeas statute. See H.R. Rep. No. 242, 102d Cong., 1st Sess., pt. 1, at 117-34 (1991); 137 Cong. Rec. S8649-65 (daily ed. June 26, 1991); *id.* at H7996-H8005 (daily ed. Oct. 17, 1991); *id.* at H8168-73 (daily ed. Oct. 22, 1991). A conference committee of the House and Senate has adopted the House proposal which retains *de novo* review. See H.R. Conf. Rep. No. 405, 102d Cong., 1st Sess. (1991), *reprinted at* 137 Cong. Rec. H11686, H11691 (daily ed. Nov. 26, 1991).

The House has adopted the Report of the Conference Committee, see 137 Cong. Rec. H11686, H11744-57 (daily ed. Nov. 26, 1991), which remains pending in the Senate. If the Senate adopts the Conference Report, it will send to the President, as part of an omnibus anti-crime bill, the most comprehensive reform of the federal habeas corpus statute since 1966 -- a reform which does not include any change in the *de novo* standard of review.

D. The Court Is Not Free To Change the Standard of Review.

As we have shown, Congress has long recognized that crafting the scope of the federal courts' habeas jurisdiction

involves a delicate balancing of competing policies. After weighing and re-weighing those policies, Congress has not enacted plans to alter the *de novo* review of state court application of law to fact. For the Court to reject that choice based on its own notions of policy would ignore basic principles of separation of powers. As the Court has ruled:

"[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches." *TVA v. Hill*, 437 U.S. 153, 195 (1978).

See also *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."). The point is both obvious and fundamental: Congress has made *de novo* review the law, and it is up to Congress to change it if it wishes.

Proponents of deference are actively pushing their cause before the current Congress, which so far has refused to adopt their proposal. If the Court were to impose a rule of deference, it would undermine the authority of the elected representatives of the People to make this choice as they consider changes to the habeas statute.

This Court should be "especially reluctant" to overrule well-settled statutory interpretations "in an area that has seen careful, intense, and sustained congressional attention." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986). As we have shown, the scope of habeas review has also "seen careful, intense, and sustained congressional attention." Here, as in *Square D*,

Congress was clearly aware of the Court's preexisting interpretation when it reexamined the law in 1966 but did not change it. Furthermore, since then, Congress has carefully considered the question now before the Court but has not amended the law to provide for deference.^{25/} Hence, the Court should not overrule its well-settled interpretation of the statute as requiring *de novo* review.

^{25/} *Helvering v. Hallock*, 309 U.S. 106 (1940), relied on by *amicus curiae* Criminal Justice Legal Foundation (at p.20), is inapposite. There the Court in 1940 rejected distinctions crafted in two 1935 opinions to a general rule established by a 1931 opinion. Unlike here, the Court was not considering the application of *stare decisis* to a longstanding precedent such as *Brown*. Furthermore, there was no indication that Congress had approved of or even considered the 1935 cases. Here, as we have shown, Congress has long been well aware of *Brown*, approved it in 1966, and has rejected the many proposals to overrule it. Cf. *United States v. Rutherford*, 442 U.S. 544, 554 & n.10 (1979) (distinguishing *Hallock* because Congress was obviously aware of the agency's construction of the statute and had not acted to overturn it). Thus *Square D*, not *Hallock*, is instructive.

CONCLUSION

The Court should reaffirm that, in determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to a judgment of a state court, Congress has directed that the federal court review *de novo* the state court's application of law to the specific facts of the petitioner's case.

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March 4, 1992